ARBITRATION JOURNAL

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FOREWORD

THE FIFTH FREEDOM

THE Consent Decree in the Motion Picture Industry has been called a Magna Carta to business to exercise the privilege of self-regulation. Whether the experiment set in motion when the Decree was signed succeeds or not, it cannot fail to strengthen one of the American basic freedoms. To those of free speech, free assembly, free press and the right to worship in our own way has been added another, always existing, great fundamental freedom. That is the legal right to settle voluntarily our own disputes. The Arbitration Law enacted by Congress in 1925 gave this legal right to Americans. The Consent Decree strengthens immensely that right, for it is the Government itself and the court which affirmatively grant it specifically to one of the greatest of American industrial groups.

The Decree, in effect, is a grant of authority to business not only to police itself, but to experiment with its own problems. Should this experiment succeed, it may well free business from many future restrictive regulations and restore much of its initiative and faith in developing and controlling itself.

Certain standards of fair trade practice are laid down by the Decree, which then says to business,—"Go regulate yourselves"; not, with the iron will of the dictator,—*"Come to heel!"*. It is an expression of faith of a Government in its people and, at the same time, a great act of statesmanship. Here we had a leading American industry and our national government at odds. In a few months the industry has moved from a situation where millions of dollars were being spent to fight, to one where a half-million dollars are being spent to keep peace.

The men who wrote this Decree, whether it succeeds or fails, wrote a historic document, for under it our Government and the motion picture industry have found a way of composing their differences and of going forward together. Instead of prosecuting, Government is cooperating; instead of dictating, Government is offering freedom; instead of drastic legislation, guiding

principles are laid down. And business, on its side, has met the Government half way. Today you have friendship instead of enmity between the Government and this vast industrial group, —a friendship demonstrated by the enthusiasm with which the industry offered to the Government the entire facilities of the Motion Picture Arbitration Tribunals, which it is spending a half-million dollars annually to maintain, for free use by the National Defense Mediation Board or any other government agency having need for such facilities.

As a backlog to these Tribunals, somewhere in the neighborhood of a thousand vitally interested and important men are swinging into action in 31 cities. They are emissaries of arbitration in their own lines of business and in National Defense, spreading it throughout every industry and profession they touch.

Thus the Decree is probably the greatest single undertaking in our time to build good faith and goodwill in inter-trade relations. As it succeeds, other industries, in just as perilous a condition, will benefit. Equally important is the fact that the Decree lifts a huge economic burden from the Government and the motion picture industry. At a time when we need all of our resources for National Defense, any great element of waste is disastrous.

One of the lessons Americans have learned from this war is that differences, grievances, rivalries and disputes among a people are regarded as among the highest assets to an invading enemy. The modern technique of war is to weaken a nation from within before it is physically attacked from without. The Consent Decree is part of the new technique of defense, which so unites a people in their mutual trust, confidence and cooperation, that these war techniques will fail.

ACKNOWLEDGMENT

ONCE again, through the generosity and cooperation of the Chamber of Commerce of the State of New York and Charles L. Bernheimer, Chairman of the Chamber's Committee on Arbitration, the funds for an issue of the JOURNAL are being provided. It seems especially fitting that the particular issue sponsored by members of the Chamber should be devoted to *Arbitration in National Defense*, and the Editorial Board is happy again to express its deep appreciation to these pioneers in arbitration.

MARCH OF EVENTS

A Pillar of Arbitration among Bombs

A notice from London says that on Wednesday, March 12th, at the Criterion Restaurant in London, the Institute of Arbitrators is having its annual meeting.

Amidst the crash of bombs, the roar of anti-aircraft guns and the falling of buildings, this pillar of freedom stands out, indicating that in the turmoil of battle the spirit of arbitration is not yet dead. It is little more than that, for in London—once the great center of arbitration for the trade routes of the world—the voice of arbitration no longer speaks with authority to the world. Elsewhere on the European and Asiatic continents, under the heel of the Axis powers, arbitration is compelled to serve at the muzzle of a gun or is altogether dead.

Never, in its long history, has the hour seemed so dark for arbitration in the land of its birth as in this time of wanton destruction of commerce. Never has its survival depended so much upon America, for it is here that both its spirit and practice must find a stronghold.

We shall remember, as we carry forward this tradition and obligation, the pillar of arbitration showing through the blackouts of London.

Goodwill in the Motion Picture Industry

In this issue the JOURNAL presents the first quarterly report of the operation of the Motion Picture Arbitration System. Remarkable as it is for accomplishment in organization, the outstanding fact is the rise of goodwill throughout the whole industry and the consequent small number of cases submitted. Instead of the thousands predicted, the total is slightly more than half a hundred, with only one appeal. What has happened is that the presence of arbitration, with all of its beneficent power of commanding confidence and cooperation, has turned in these short months the tide of distrust into belief, cynicism into open-mindedness, and dire predictions into goodwill. This change is uniform throughout the industry; it is reflected in the trade press, in relations between producers and exhibitors, and in the attitude of both toward arbitration. It is particularly evident

in the attitude of counsel for the parties. It is seen in the promptness with which errors or oversights have been called in a friendly way to the attention of the Association and from the expeditious way in which they have been rectified.

This attitude of the industry has made the work of the Association as the Administrator of the System not only pleasant but has added greatly to its efficiency. The Administrative Committee is happy to pay this tribute to the unfailing courtesy and cooperation of the entire industry to an organization which must have seemed to it a stranger upon its premises.

Mobilization of Arbitration Resources

The JOURNAL records in this issue the first undertaking in history systematically and scientifically to organize the arbitration resources of a country as a measure of National Defense. The modern methods of warfare—to divide a nation from within and then conquer it from without—are responsible for the undertaking to eliminate within this nation every unsettled possible dispute or grievance which may add to disunity and so further the ends of warfare.

Many decades ago, the trade associations of America took the lead in developing arbitration in industrial and commodity groups. Today, they again swing into action in behalf of National Defense.

Charles R. Cosby, President of the Trade Association Executives of New York, has sounded the mobilization call and is assuming the leadership. The call is in the form of a letter and questionnaire to all members asking them to examine their own resources for settling disputes, to inquire what resources their members have and to return the questionnaire to the American Arbitration Association so its Conference Committee can immediately take up with each organization an expansion and further use of its resources in the present emergency. The questionnaire covers both commercial and labor disputes and arbitration.

Government Acts in Labor Disputes

As this issue goes to press, the future method of settling labor disputes, insofar as the Government is concerned, is still obscure.

A National Defense Mediation Board has been appointed under an Executive order which enables it

to act only when a dispute is sent to it from the Department of Labor. The Conciliation Service of that Department has been enlarged as to personnel and activity.

Various proposals have been made to Congress. Mr. Knudsen would have a "cooling off" period during which mediation and conciliation steps would be carried through. Representative Vinson's bill would provide for such a period, but would make mediation compulsory and would "freeze" the *status quo* of labor; and many other bills are imminent or have already been introduced. President Green, of the American Federation of Labor, advocates creation of machinery similar to the National War Labor Board of 1918; Under-Secretary of War Patterson tells the House a revision of the Board is not needed. Mr. David Lawrence goes still further and, in his *New York Sun* column of March 10, 1941, expresses the opinion that no new laws are necessary to prevent stoppages of work on defense industries if the Administration will effectively use the present laws.

Meanwhile, public opinion is being aroused and educated to the seriousness of labor disputes and their threat to national defense and internal unity. It may act to prevent drastic or dangerous legislation being passed in the heat of argument.

Voluntary Agencies Support Government Mediation Bodies

The American Arbitration Association has pledged the use of its voluntary facilities in 30 cities to the National Defense Mediation Board in the following telegram:

> The Board of Directors of the American Arbitration Association, with the approval of the Motion Picture Producers, voted today to place the facilities of the thirty Motion Picture Arbitration Tribunals at the disposal of the National Defense Mediation Board, without charge, for such meetings or conferences as the Board or its associates may wish to hold in the Association's Tribunal headquarters in the following cities:
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> Albany, Atlanta, Boston, Buffalo, Charlotte, Chicago, Cincinnati, Cleveland, Dallas, Denver, Des Moines, Detroit, Indianapolis, Kansas City (Mo.), Los Angeles, Memphis, Milwaukee, Minneapolis, New Haven, New Orleans, Oklahoma City, Omaha, Philadelphia, Pittsburgh, Portland (Ore.), St. Louis, Salt Lake City, San Francisco, Seattle, Washington, D. C.
>
> The Association also offers its services, and those of its Panel of Arbitrators, wherever they are willing or qualified so to act, for the arbitration of any disputes that may be referred to the Association by your Board, or as fact-finders in aiding the Board with its work.

In the meantime, other voluntary agencies and self-regulatory interests have rallied to the support of the Government. At a meeting of impartial chairmen of 22 major industries in New York City, held at the Association's headquarters on March 28, the services, extensive experience and arbitration facilities of this important group, representing management and unions of 1,250,000 workers, were pledged to the National Defense Mediation Board and other government agencies dealing with management-labor strife, for such calls as they may make in the interests of National Defense.

In accordance with this policy of cooperation between voluntary agencies and the Government, the American Arbitration Association has also extended the use of the facilities of its branch offices to the Division of Conciliation and its Commissioners of Conciliation or representatives who are engaged in the maintenance of industrial peace.

Appraisals Bow to Arbitration

In its 1941 session, the Legislature of the State of New York opened a new field to commercial arbitration when it passed the bill including appraisals under arbitration law.[1] For many generations courts have held that questions of appraisal do not constitute *bona fide* disputes, such as arbitration laws contemplate shall be submitted, but only matters of valuation and therefore may not be submitted to a legal arbitration.

The inclusion of appraisals under arbitration law has led the American Arbitration Association to broaden the work of its Accident Claims Tribunal to include this new subject and others in an Insurance Arbitration Tribunal.

Future Issues of the Journal for 1941

In accordance with its policy to present a special subject each issue, the July issue of the JOURNAL will feature Inter-American and Canadian-American Arbitration in the trade routes of the Western Hemisphere and its contribution to American friendship and unity. The October issue will contain a symposium on *The Trade Association and Arbitration.* It will present the story of the leadership these organizations are taking in keeping commercial and industrial peace during this crisis and their part in building the American Arbitration System.

[1] See p. 237, this issue.

AMERICAN ARBITRATION ASSOCIATION

CUMULATIVE AND ANNUAL REPORT FOR 1940

C. V. WHITNEY *

IN presenting my first report, as President of the American Arbitration Association, I would like to review briefly the facts of its history and organization. I do this because I find more people are familiar with the current work and tribunals of the Association than with the organization itself. This report is, therefore, cumulative, as well as a review of achievements during 1940.

As 1940 marks the 15th Anniversary of the American Arbitration Association, it seems that a brief review of the progress of arbitration over this period would be a fitting observance of this anniversary. That progress is due to efforts of thousands of men and women, particularly our Panels of Arbitrators, who have so steadfastly advanced arbitration, and to the many collaborating trade and commercial organizations which, by their pioneering work and example and cooperation, have been indispensable collaborators in building the systems of arbitration upon which I am reporting.

It will be recalled that in 1926 there were no tribunals that were not limited in their jurisdiction as to subject matter or locality or parties. Today there are five Tribunals that are universal—the Commercial Arbitration Tribunal, the Industrial Arbitration Tribunal, the Accident Claims Tribunal, the Inter-American Commercial Arbitration Tribunal and the Canadian-American Commercial Arbitration Tribunal. All of these tribunals are maintained and administered by our Association.

In 1926, there were no national general facilities; no uniform standard arbitration clauses for use in contracts and no national administrators. Today these are available throughout the Western Hemisphere.

First may I review briefly the organization and administration of the Association and bring up to date this phase of our work.

* President, American Arbitration Association.

ORGANIZATION AND ADMINISTRATION

The American Arbitration Association was founded in 1926 and under its New York State Membership Corporation Charter its entire resources are devoted to advancing the knowledge and use of arbitration in the interests of the United States; the maintenance and operation of tribunals for the settlement or control of economic disputes; the study of arbitration and publication of findings in books, journals, reports; and the co-ordination of arbitration facilities and education through a central information system which has 300 trade associations as channels of communication.

The Association is non-profit-making and non-partisan in character. None of its officers or directors may profit from any of its activities or undertakings. All of its income is devoted to the advancement of arbitration. By reason of its quasi-judicial responsibilities, the Association has no other activities and is identified with no other organization.

The Association is governed by a Board of Directors representing the public, trade, commercial and labor interests of the United States. These Directors are chosen at an Annual Meeting in January in the manner provided in the by-laws. Its officers consist of a President, First Vice-President (who is the executive officer) and several Vice-Presidents in charge of different activities; a Chairman, a Vice-Chairman of the Board; a Chairman of the Executive Committee; a Chairman of an Arbitration Committee and a Secretary and Treasurer. These officers are elected by the Board of Directors at its January meeting. An Executive Committee of fifteen members administers the affairs of the Association.

The income of the Association is derived from the following sources: 1) Grants from foundations or contributions for research and education; 2) Fees for the administration of tribunals; 3) Membership dues for the maintenance of the organization and the development of arbitration as a science. The Association has no endowment, pays no dividends, makes no contributions to any other organizations and receives no subsidies or government funds.

The administrative offices of the Association occupy the eighth, and part of the ninth floor of the U. S. Rubber Company Building in Rockefeller Center, New York. These headquarters include

administrative offices, hearing-rooms and research facilities. It is the publication office of the ARBITRATION JOURNAL. It is also the headquarters of the Inter-American Commercial Arbitration Commission and its Tribunals and of the Canadian-American Commercial Arbitration Commission and Tribunal.

A brief description of these Tribunals and their achievements follows:

COMMERCIAL ARBITRATION TRIBUNALS

In 1926, this Association started with one tribunal and three rooms. Today there is a national commercial arbitration tribunal system, having facilities in 1,577 cities of the United States and a Panel of approximately seven thousand arbitrators ready for service in these cities. The Association has five hearing rooms, now actively in use, and occupies twenty times the space it held in 1926. While statistics are not always inspiring, a few figures will do much to summarize the progress made since 1926.

In 1926, 243 cases were decided in the Tribunal of the Association. By the end of 1940, 5,906 commercial and industrial disputes had been submitted, 485 having been referred in 1940. Fully the same number were settled in a friendly manner as a result of negotiations preceding arbitration.

In 1926, 35 per cent of the cases were submitted by attorneys; in 1940, 75 per cent of the cases were so submitted, showing the increasingly friendly attitude of the Bar and the steady building up of a *practice of arbitration.*

In 1926, only 20 per cent of the cases arose under arbitration clauses; in 1940 this figure had increased to 79 per cent, indicating the stabilization of organized arbitration.

In 1926, the Association had five cooperating dues-paying trade organizations to which the Association rendered service; in 1940 the number had increased to 45. In addition, we have assisted in drafting rules for many important organizations now conducting their own arbitrations and hold an advisory relationship to many others.

The geographical distribution of our Tribunal facilities in 1926 covered only New York City. In 1940, we had arbitrators in 1,577 cities in the United States and facilities for Tribunals in Canada and in 19 of the 20 American Republics.

Our National Panel of Arbitrators in 1926 had 480 members, all in New York City: in 1940 we had 2,400 members of the Panel in New York City and 4,602 in other cities, in addition to other special Panels later described.

MOTION PICTURE ARBITRATION SYSTEM

The fact that this Association maintains a national system for commercial arbitration and has national machinery available made possible the greatest expansion of its work in 1940. This came through its being named administrator for the motion picture arbitration system.

Under a Consent Decree for the motion picture industry, signed by Judge Henry W. Goddard, of the U. S. District Court for the Southern District of New York, on November 20, 1940, ending the Government's anti-trust suit against the major motion picture distributors, a Motion Picture Arbitration System was authorized. The Consent Decree was agreed to by the Department of Justice and the following five distributor-defendants: Loew's, Inc.; Warner Brothers Pictures, Inc.; R.K.O. Radio Pictures, Inc.; Twentieth Century-Fox Film Corporation and Paramount Pictures, Inc. Under this Decree the American Arbitration Association was made Administrator of the arbitration set-up under that Decree for the settlement of disputes between producers and exhibitors.

The Association was thus confronted with a most intensive task of organizing arbitration machinery. By February 1, 1941, it was required to set up central administrative machinery; lease suitable office space and establish, equip and man thirty-one Tribunals in as many cities from Boston to Seattle; install filing, bookkeeping, auditing and financial systems for the spending of an annual budget of $490,000; prepare arbitration forms for Tribunal use; establish thirty-one Special Panels of Arbitrators; prepare manuals and conduct courses of training for the men appointed to act as Clerks of the Tribunals, and perform innumerable other tasks in connection with setting up the Arbitration System.

How well the Association succeeded in its task is now a matter of record. Early in January, the major part of the task of organization had been accomplished and the Arbitration System was scheduled to be ready for operation on February 1, 1941.

The Executive Director had visited and held organization meetings in 30 cities. . . . . 31 clerks had been appointed and an administrative staff organized. . . . . A model layout had been prepared as a standard for Tribunal headquarters. . . . . 31 leases of Tribunal space were signed. . . . . Official maps showing locations of Tribunals had been prepared and distributed. . . . . Forms for use in Tribunal proceedings and manuals of instructions for Clerks and Arbitrators were prepared. . . . . A training course for Tribunal Clerks had been conducted in New York City under the direction of Professor Wesley A. Sturges. . . . . Bookkeeping and auditing systems had been installed, a Comptroller appointed and financial instructions issued. . . . . Special panels of arbitrators had been organized in each of the 31 cities covered by the System.

The cities in which Tribunals have been established are the following: New York (including Brooklyn and New Jersey), Albany, Atlanta, Boston, Buffalo, Charlotte, Chicago, Cincinnati, Cleveland, Dallas, Denver, Des Moines, Detroit, Indianapolis, Kansas City, Los Angeles, Memphis, Milwaukee, Minneapolis, New Haven, New Orleans, Oklahoma City, Omaha, Philadelphia, Pittsburgh, Portland, St. Louis, Salt Lake City, San Francisco, Seattle, Washington, D. C. I may add that the system is now in full operation: 40 complaints have been filed, 4 awards have been made and entire satisfaction has been expressed with the service.

INTER-AMERICAN AND INTERNATIONAL TRIBUNALS

Through the efforts of this Association commercial arbitration has been extended to inter-American and international trade. The most important of these Tribunals, as is being proved in this world crisis, is the Inter-American Commercial Arbitration System, organized in 1934 under the auspices of the Pan American Union and administered by the Inter-American Commercial Arbitration Commission. The Commission's headquarters are with the Association, and it is supported from our budget. Its work is the subject of a special report, made to the International Conference of American States.

One of the interesting features of the Commission's activities, however, is the work of its sub-committee on better business relations, which is carrying on active work in clearing up cur-

rent trade disputes or misunderstandings or grievances among business men of the Americas.

We will be opening, early in May, in the Association's headquarters, a separate unit consisting of administrative offices and a hearing room to accommodate the increasing activities of the Commission.

In the fall of 1939, the Association entered into an arrangement with the Canadian Chamber of Commerce for the creation of a Canadian-American Commercial Arbitration Commission. With the completion of this Tribunal, and its administration by a joint Commission of Americans and Canadians, the whole Western Hemisphere now has an arbitration system, and whether the dispute is to be arbitrated in Vancouver or Buenos Aires, the same sound principles of arbitration will be applied. By reason of a survey of the arbitration laws of Canada made possible by a scholarship contributed by one of our directors, it appears that arbitration clauses in contracts will be as legally enforceable as in the United States. We understand clauses are now in use and cases are coming in. One of our first cases concerns Canada and Guatemala, thereby giving us a hemisphere connection.

The Association does not claim prophetic foresight. But the fact remains that in July, 1939, less than two months before the outbreak of hostilities in Europe, the Association concluded a joint agreement with the International Chamber of Commerce, whereunder, for the first time since its creation, arbitrations of the Chamber do not have to go through Paris but can be held in the United States, under our Rules, when one of the parties is a citizen or resident of this country and the parties so agree. The importance of this agreement appeared almost immediately after the outbreak of the war, for many of the activities of the International Chamber of Commerce were suspended and its headquarters removed to Sweden, and foreign governments inserted arbitration clauses, enforceable in the United States, in their purchasing contracts.

INDUSTRIAL ARBITRATION TRIBUNAL

In 1937, the Association found itself being named in labor agreements, with the responsibility of appointing arbitrators

when called upon by the parties to do so. These demands led to the organization of an Industrial Arbitration Tribunal. This Tribunal serves not only for the actual settlement of disputes, but as an experimental laboratory for testing principles and standards for industrial arbitration.

The success of the Industrial Arbitration Tribunal has greatly exceeded our expectations, for it was with some reluctance that we entered this new field. During the three years of its operation, the Tribunal has received approximately four hundred cases for arbitration, with an increase in the number of matters submitted indicated each year.

The Tribunal, in response to demands for more elastic services, has added to its industrial arbitration service the appointment of fact-finders and impartial chairmen. These new services are intended to provide for the adjustment of grievances or claims or disputes that may not be arbitrable under arbitration laws or where a formal arbitration and award is not sought by the parties.

Every industrial arbitration award has been honored by observance by both parties, and the number of unions, both A. F. of L. and C.I.O. affiliates, using the facilities of the Tribunal is steadily increasing. They include: American Federation of Hosiery Workers, American Federation of Radio Artists, International Fur Workers Union, National Maritime Union, International Brotherhood of Teamsters, Chauffeurs, etc., Steel Workers' Organizing Committee, Textile Workers' Organizing Committee, United Auto Workers of America (New England), United Mine Workers of America, United Optical Workers Union, United Shoe Workers of America, United Wholesale & Warehouse Employees.

ACCIDENT CLAIMS TRIBUNAL

In 1933, the Association organized, with the assistance of a Special Committee of Lawyers, a Tribunal for the determination of accident claims pending in the municipal courts of New York City. This undertaking had the approval and cooperation of the President Justice of the Municipal Court, the casualty insurance companies, George S. Van Schaick, then State Superintendent of Insurance, and Louis H. Pink, present Superintendent.

To assist in disposing of accident claims, the Association maintains a Special Panel of Lawyers, consisting of 350 attorneys chosen for their integrity, knowledge and familiarity with judicial procedure, who give their services.

In the period from October 1, 1933, to December 31, 1940, 9,869 cases were filed with the Accident Claims Tribunal.

PANELS OF ARBITRATORS

I would like to say a few words of appreciation of the men who serve on our Panel of Arbitrators. With the addition of the Motion Picture and Industrial and International Panels the Association has close to ten thousand men who have enrolled as peace officers in its various systems of arbitration. These men stand ready, upon short notice, to lay aside their own important affairs and act as arbitrators, without any compensation or other reward. These Panels have been carefully selected during our 15-year history. I think a bird's-eye view of these Panels as they now stand may be of interest.

The National Panel of Arbitrators operates throughout the national system of the American Arbitration Tribunal in 1,577 cities, and enlists the services of some 7,000 outstanding business and professional men; *a Special Panel of Lawyers* serves our Accident Claims Tribunal and comprises approximately 350 of the leading attorneys in New York City who give their services in this important work; *The Motion Picture Panel of Arbitrators,* distributed over 31 cities, numbers about 1000 outstanding men who serve only in the Tribunals established in the Motion Picture Arbitration System; *The Labor Panel of Arbitrators,* consists of about 150 carefully selected men, who are acceptable to management and labor when impartial arbitrators are desired; *The Inter-American Panel* comprises 200 men selected in each of the countries represented in the Inter-American Commercial Arbitration Commission by the National Committees of those countries; *The International Panel of Arbitrators* is a specially selected group of 120 international business men who are citizens of many countries and resident in the United States, thus affording the parties to a dispute arising out of international trade an opportunity to choose an arbitrator who is not a citizen of the country of either party.

RESEARCH AND EDUCATION

Much of the work of the Association along the lines of research and publications has been covered in previous reports. I need only mention the survey of American arbitration law and court decisions, which resulted in *The Code of Arbitration Practice and Procedure,* and *Suggestions for the Practice of Commercial Arbitration,* and the authoritative book on *Commercial Arbitrations and Awards,* by Dr. Wesley A. Sturges, which was published in collaboration with the American Arbitration Association.

In the field of foreign arbitration law, the Association has translated a survey and has had it published in the United States. It has also made a study of arbitration law and practice in the 21 American Republics.

A series of state surveys were conducted in the United States, intended to portray the origin, history and present status of arbitration, in California, Connecticut, Maryland, Massachusetts, New Jersey, Ohio, Oregon, Pennsylvania, Texas, Virginia and Washington. The surveys in California, Connecticut, Ohio and Pennsylvania were influential in the enactment of modern arbitration statutes. In 1927, a comprehensive survey of the practice of arbitration in 2,000 trade, commercial and professional organizations resulted in the *American Arbitration Year Book.*

From the beginning of its work the Association has carried on the research necessary to the maintenance of a technical information service. A most important part of this service is the series of 27 forms for arbitration procedure, available to persons desiring to arbitrate, and a pamphlet entitled *The American Arbitrator,* which is a guide for arbitrators.

In 1937, the Association found itself in a position to undertake the publication of a quarterly ARBITRATION JOURNAL, the only periodical of its kind in existence, thus adding current events and discussions to its more technical publications. Among its current service pamphlets are *The Press Speaks for Arbitration, Arbitration in Action, Three Years of Arbitrating Labor Disputes, Arbitration Speaks for Itself* and a *Warning on the Urgency of Controlling and Isolating Economic Disputes.*

One of the greatest contributions which the Association makes through its research and educational work is the establishment of standards, not only for itself but for arbitration generally. In this way policies, principles and practice are determined and

established. These standards extend to arbitration law, rules of procedure, clauses in contracts, selection and qualifications of arbitrators, administrative and ministerial services, setting up of tribunals, and other matters relating to arbitration.

For the purpose of interesting the Bar in educational work, the Association appointed a Special Committee of Lawyers. In this field the Association is fortunate in having the assistance of the Arbitration Committees of the Association of the Bar of the City of New York, the New York County Lawyers' Association, the New York Chapter of the National Lawyers' Guild, the Brooklyn Bar Association, Bronx Bar Association and the Queens County Bar Association.

OUTSTANDING ACHIEVEMENTS OF 1940

Although I have already covered many of the Association's outstanding achievements in 1940, I should like to summarize them briefly, for they make an impressive record:

The Association has come through the year without a deficit and has met all of its financial obligations.

It approached its ten thousandth case in its Accident Claims Tribunal, submitted since the establishment of the Tribunal in 1933.

It has been named under a Federal Court decree as Administrator of the Arbitration System of the Motion Picture Industry and for the first time arbitration will be tried as a method of enforcing the terms of such a Decree.

It set up an Inter-American Better Business Committee to eliminate malpractices which are damaging reputations and goodwill between business men of the American Republics.

It has entered the National Defense field by engaging in a nation-wide and hemisphere-wide endeavor to strengthen commercial and industrial goodwill, in industries and between industrial groups.

It has created a National Defense Committee to bring to the attention of American business men the urgency of controlling and isolating economic disputes and methods by which this may be accomplished.

It has created a Committee on War Contracts to study the use of arbitration in such contracts, as to theory, practice and the

legal authorization necessary to preserve the rights of parties entering into war contracts to an arbitration proceeding if and when disputes arise.

Every industrial award has been honored by observance of both parties and the number of unions using arbitration is steadily increasing.

It inaugurated Arbitration Year in the Americas, culminating in the observance of Pan American Arbitration Day on the 50th Anniversary of the founding of the Pan American Union.

Its standard arbitration clause was adopted by foreign governments for use in contracts covering the purchase by official Commissions of war supplies in the United States.

It established a fellowship at McGill University in Montreal, for the study of provincial arbitration laws in Canada, incidental to the work of the Canadian-American Commercial Arbitration Commission.

It is establishing a Philippine-American Commercial Arbitration Commission as a link in a plan to form a comprehensive system of commercial arbitration through foreign trade channels.

It awarded the Gold Medal of the Inter-American Commercial Arbitration Commission for Distinguished Service to Dr. Juan Samper Sordo, of Colombia.

It created a panel of arbitrators for the air transport industry, following the establishment of an arbitration plan for the industry and its acceptance by the 15 air lines representing all the domestic air transport business in the United States.

It greatly enlarged its Arbitration Law Committee and created subcommittees to: 1) study legal problems arising under Consent Decrees and 2) study the possible use of the Consent Decree method in other trades and industries.

It doubled its office space and increased the number of its hearing rooms from three to five.

RECOMMENDATIONS

I find the work of the Association in such excellent, active shape that I have but few general recommendations. They are as follows:

1. I believe we should concentrate upon doing our job well under the Consent Decree. If we can bring permanent peace

to the fourth largest industry in the United States and as between the government and this industry, we may be opening the way to an entirely new method for arbitration. We shall, I know, then be given assignments under other Consent Decrees. Here we are making history.

2. We should not in any way, because of this new work, neglect commercial arbitration in other fields; but should press forward toward the goal of a general use of arbitration clauses, particularly in war contracts.

3. I believe we should extend the work of our Industrial Arbitration Tribunals in every way consistent with the principles upon which the Tribunal is founded.

When we set up our Industrial Arbitration Tribunal three years ago we limited its activities to disputes arising out of labor contracts or their renewal. We deliberately did not undertake to enter into situations where strikes were threatened or called.

Since that time, the world is at war and we ourselves are threatened with war from within and without. Our experience and facilities, as the leader of the voluntary resources in this country, make it imperative that we add the utmost of our aid. For this reason, this Association, with the consent of the Motion Picture Producers and the Department of Justice, has offered the facilities of its 31 tribunals to the National Defense Mediation Board for service in the settlement of labor disputes, adding to our service fact-finders and impartial chairmen. This does not mean that our Tribunal will engage in settling strikes, but only that its incomparable facilities will aid others engaged in this work.

I suggest, therefore, that this Association when called upon nominate or appoint impartial chairmen and work out standards which will build the same foundation of integrity in this field as has been built for arbitrators. I suggest also that the Association, provided funds are made available, carry forward its long-cherished idea of an impartial survey of the technique of settling industrial disputes, with a view to collaborating in establishing a national system of industrial arbitration as able and effective as is the national system of commercial arbitration. I suggest when the U. S. Government calls for the use of our facilities that we offer them as our contribution to National Defense.

In this movement for the preservation of the great freedom of the right voluntarily to settle business disputes and in the mobilization of arbitration resources for National Defense, I believe this Association should take the leadership and thus supplement, by voluntary action, the efforts of the Government. Above all, I believe arbitration has an important place in building the inner security of this country, and I will devote my personal efforts this year to the development of arbitration in National Defense.

ARBITRATION IN NATIONAL DEFENSE

DIVIDE AND CONQUER

The Menace of Disputes to National Defense

Frances Kellor *

I

Divide within, then conquer from without. This is the technique of modern warfare. It is a technique that makes civil defense of the highest importance, for it reverses the sequence of warfare. The first attack is upon the populace of a nation and only afterwards do the armed forces arrive. To instill fear, confusion, hatred, loss of hope and faith in the country to be attacked, to undermine morale and soften up a people—these make it easy to defeat the army and navy and to render conquest certain.

The prevalence of disputes, differences, grievances and misunderstandings within a country offer vulnerable points for such undercover attack. Their fomentation and magnifying out of proportion to their real importance are matters of skill and time in the hands of expert manipulators.

A dispute, whether of an economic or personal nature, is so deadly today because it is a revelation of underlying conflict. It is the tangible evidence of maladjustment. It is the exposure of misunderstandings, suspicion and impaired confidence. It is a symptom of mental and moral confusion. Even though it reveals only emotions and ambitions, it brings to the surface an undercurrent that indicates goodwill to be on the decline, cooperation giving way to conflict and confidence being corroded by suspicion.

In a world where the total destruction of goodwill seems to be the objective, every dispute in the United States and on the Western Hemisphere—whether large or small, civil, industrial or commercial, prevailing in a great city or hidden in the re-

* First Vice President, American Arbitration Assn.

motest hamlet—is of the utmost importance. For every such dispute and its disputants are the center of careful cultivation to cause confusion, unrest, suspicion and all of the qualities which undermine national unity and impair the inner defense line upon which a nation must depend for its morale and for its supplies for army, navy and land forces.

Yesterday, so to speak, a commercial or industrial dispute was the private affair of the individuals who made it; today every such dispute is the concern of the whole nation. Why?

Every such dispute makes the American inner defense line vulnerable to attacks from enemies within its borders at the vital points of production, manufacture and distribution, at a time when the army, navy and air defenses depend upon them for maximum speed and efficiency.

Every such dispute escapes the boundaries of the factory and the shop and penetrates to the home and personal and social life of the community. There it furnishes the unrest and ill-will that make that community fertile ground for inciting people to revolt against their own institutions through the instillation of doubt and hate and revenge.

An economic dispute, in the present state of world affairs, is as infectious and menacing as a contagious disease. That it attacks more directly the spirit of a people makes it no less dangerous. Even when it does not destroy, a dispute leaves a trail of ill-will which any hound of enmity can uncover for its master.

Every dispute, if allowed to go unchecked or unsettled, becomes a pestilential spot. It multiplies itself and in a short time, it slows up production, impedes manufactures, retards deliveries, upsets business confidence, delays payments, impairs credit, and in a thousand infinitesimal and obscure ways hampers National Defense.

But such disputes have an even graver, because more insidious, influence. They sap morale, they divide loyalties, they are dry rot in the roots of patriotism. Nothing so instills hate and fear as disputes and their underlying causes of fancied or real injustice, inequalities or discrimination on the one hand and greed for power and ruthless competition on the other. Once started, hate grows fast and is soon out of bounds. The public portrayal

of this unrest gives encouragement to the enemy ever on the watch for such manifestations of weakness.

Such economic disputes have enormous capacity to expand. They are, if one may so put it, a disease called ill-will. Like other malignant diseases, they multiply themselves. First, they consume the finer processes of mind and spirit in the disputants; then the dispute grows out of all proportion to its original shape and size as each party seeks to expand his grievance or claim. Misstatement and even perjury are brought to the rescue; then witnesses are sought and sometimes corrupted; then appear the opposing experts for each side, who, under other circumstances, might agree. Flowing through this mass of ill-will is claim and counter-claim, accusation and denial, attack and defense, until friends and neighbors and business associates are driven to take sides and the whole industrial group, if not the community, becomes concerned with the outcome.

What may have started out as a disagreement over facts, or a difference of opinion, or vagueness as to understanding, or a mere question as to quality, price or time of delivery of merchandise, has now become so exaggerated, through the influx of ill-will, that it takes a whole battery of lawyers on each side to extricate fact from fiction and reality from illusion, or it takes violence to settle the issue. However it ends, scars will be left and there will be bitter memories which will outlive the lifetime of the original parties.

Imbed enough of these quarrels in defense industries and the whole machinery creaks. Instill enough ill-will into the normal commercial life of a nation and its economy goes sour. For economic production is made up of thousands of parts—each dependent upon the other. So is an automobile built. It takes, however, but one small screw or bolt to put it out of commission or lead to a crash. So a dispute may well be the small screw or loose nut in our defense mechanism.

There is a prevailing idea that only big disputes cause great damage and are dangerous. It is time Americans discarded this idea. One of the reasons for the success of the Nazis is that they overlook nothing. In their penetration of countries by so-called tourists and other visitors, before they make war upon them, every weak spot is uncovered and every man or situation likely to break in their favor is carefully recorded. One

cannot doubt that within our own land, a similar check-up is being made and that our small as well as great disputes, and big or little dissatisfied disputants, are not escaping notice.

II

The eastern world is in mortal combat because for the last two decades disputes went unsettled and the hatreds growing out of them were unchecked. Hate is now let loose upon the world.

Although this fact has been hammered into our consciousness day by day, Americans are not yet fully aware of the menace of their own internal disputes. Every other danger signal of a maladjustment in human and economic relations receives almost immediate attention. But let a dispute run up its red signal flare of warning and it is immediately nobody's business. Every other economic risk carries some kind of check or insurance or some safeguards are imposed by public policy—but not for disputes. They must still run their wasteful and menacing course of delay; they must still be allowed to destroy the things that men hold dear—friendships, happiness, respect, confidence and security.

Why has the western world so long lain under this spell of indifference? Why has the litigation of commercial disputes attained such proportions that the Chief of the Division of Commercial Laws had this to say in 1924: [1]

> "The aggregate economic loss to the Nation through the necessity of referring to courts the trial of disputes arising in the course of trading would stagger imagination if it could be accurately computed both as to actual cost and to the indirect drain upon national resources. Next to war commercial litigation is the largest single item of preventable waste in civilization."

Why have Americans so long tolerated a belief in the inevitability of disputes, in that they must, like other infectious diseases, be allowed to run their course? Why is it that only since the first World War has it dawned upon men that disputes may be foreseen and checked even before they have arisen? Why is it that but so recently have economic disputes been made the subject of exhaustive research and analysis?

[1] A. J. Wolfe, Chief of Division of Commercial Laws, of the U. S. Department of Commerce, in *Commerce Reports*, June 30, 1924.

The answer takes us deeply into the philosophy and psychology of the American people.

First, the average American is an incurable optimist and, therefore, believes himself to be immune. It is well that this faith should exist, but not to the point of blindness. This faith is typified by the business man who says: "Why worry? I have never had a dispute." This proud boast in the strongholds of industry may have sufficed for yesterday but not for today, when disputes are not always of his making but are being made to order for him. So, also, is the industrialist blind who takes no precautions because he never has had a strike. So must his forefathers have regarded tuberculosis or pneumonia which ravaged the community but which are today foreseen and checked. In the world today, there is no immunity for any man or industry; there are only precautions and vigilance.

Second, the American, being an individualist, has long regarded disputes, when they come to him, as his own personal problem, different from those of anyone else and, therefore, his own affair. Typical of this attitude of mind is the man who asserts: "I will have no interference from outsiders in my business." Who are these outsiders and what is their business in a world at war? Where is the individualist of yesterday in Europe, and what of his business after Nazi tanks have run over it? In a time of National Defense, when all American resources are being called into action, all problems, including disputes, are the common property of a people defending itself. The isolationist in disputes is as unreal today as is the isolationist nation. Both are ostriches with their heads buried in the sand. They may awaken to find themselves captives of government regulation unless they themselves lead the way out by their own self-regulation.

Confidence in his own immunity and perpetuity of individual isolation has bred in the American a complacency toward disputes. He takes them for granted and believes they must run their course. Therefore, he is in no hurry to settle them and is tolerant of long and expensive court trials, long delayed adjustments and interminable bickerings. Since his forefathers have followed that course, it is good enough for him. But these same forefathers had no axis powers to reckon with; they had no invaders of America on the horizon; they had no enemies burrow-

ing from within to whom a long drawn-out dispute was a bonanza.

Lastly, it may be observed, it takes size to attract the American mind and to challenge his attention. Unless it is a big dispute, with thousands of people or thousands of dollars involved, or unless those involved have big names, or have big power, his notice is not attracted. How different this viewpoint is from the totalitarian mind, which sees an opportunity in every small dispute, in every dismissed workman, in every dissatisfied injured person, in every fraudulent mail order, in every business mistake and which is ready to capitalize incipient ill-will into antagonism to American institutions. Nothing is too small or inconspicuous to escape notice or to invite contempt for American government proceedings.

One of the reasons for regarding a dispute with indifference was that Americans, individually, could afford them. The enormous profits and reserves of industry have enabled them to pay the costs of disputes. They could afford to shut down their plants; they could afford the high costs of litigation; they could regard indifferently adverse publicity. They could afford delays and maladjustments, for they held power.

Today industry cannot afford disputes; neither can the nation. Increasing taxes, higher costs of production and higher wages cut the reserves for disputes. The demands for defense and the publicity of disputes that reveal points of attack for the surreptious invader, put the risks too high.

Nor can the nation afford the risks of disaster to its own inner defense line. Any individual, engaged in a public acrimonious controversy, is in a state of confusion concerning his rights and his proofs. He is obsessed with the chance of winning to the exclusion of much else that is urgent. He is concerned with the effect of the dispute upon his reputation, his business or his family. He is in doubt about his future relations with his adversary. He is torn between the desire to retain a friend and to win at all costs, with pride playing an enormous role in his decision. He is open to whispers and suggestions and points of view concerning his country which at another time he would not tolerate. For the time being, he is certainly a less useful member of society and perhaps an actual liability.

A dispute, however small or local, is, therefore, a matter of

public concern. It is possible that, though the individual industry can afford to continue the quarrel, the country cannot afford it. It is possible that, when disputes give aid to enemies within a nation, it is a primary duty of the country, in its own defense, to see that this aid is no longer given. It is possible, when a war contract is let to a company and it lets sub-contracts, that these activities become so integral a part of National Defense that the government and nation are partners in those concerns and disputes are no longer private affairs.

Owing to their optimism and individualism and opulence, Americans have not found a common interest in disputes. Each one has tended to regard a strike in another's plant as strictly that other's affair; each one has regarded another's lawsuit as strictly the litigants' business. Each one has come to regard an accident as solely the affair of the injured person and the insurance company.

But Hitler's emissaries do not so regard them. To their keen minds and clear eyes each one fits into the pattern of "divide and conquer"; each has a place in their scheme of totalitarianism; each is seen in relation to the other as swelling the volume of discontent and ill-will.

III

In the first World War, which was a battle between men and where war was formally declared and hostilities began from the outside, disputes and grievances and mismanagement within a nation were not so important. The war was far from our own shores and there was no defense problem. Today, the situation is wholly different. The invasion of America by subterraneous, circuitous methods has been going on for a decade with no declaration of war. The real attack has first been made upon American institutions and the American way of life. This change shifts the menace of disputes from the individual to the nation, no matter where it originates, what it concerns or who are the participants.

Today, disputes are to be found everywhere—in the home, the office, the factory, the salesroom—in our transportation, warehousing and financing systems. They are brought there by ourselves, through our own practices, through complex racial relations, through the activities of enemies within the country.

Wherever men seek power, riches, advantages or preferment, disputes are to be found, more acutely than they existed in 1914. But they are also fomented deliberately and purposely by others who know their disastrous effect upon national unity.

But, observing the new techniques of war and the causes of the downfall of other nations and the part disputes and grievances have played in them, Americans are awakening to the fact that disputes bear a vital relation to the inner American defense line. In 1914 there were no instruments for the control, isolation and correction of disputes; today they exist. Today there are whole new mechanisms for dealing with industrial disputes; and there are hemisphere-wide facilities for dealing with commercial disputes. We can prevent as well as control disputes. We have wholly new instruments of self-regulatory control and for clearing whole industrial groups of disputes. The Consent Decree for the motion picture industry offers an illustration. Both governmental and voluntary efforts have modern techniques if they will but use them.

The question is, are we too late so to mobilize these resources as to make a dispute-free America an asset to National Defense, or is there still time? The answer is, nothing is too late for America in action.

MOBILIZATION OF VOLUNTARY ARBITRATION RESOURCES

EVAN E. YOUNG *

ARBITRATION has three attributes—speed, economy and justice—that are precisely the qualities National Defense requires in the elimination of disputes. With its famed ability for organization and utilization of its resources, it is natural that a great, free country like America should turn to this expedient in time of trial.

By the resources of arbitration is meant not only the will of Americans to peace, but whatever facilities they have set up in the way of ideas, relationships, methods or machinery that can be put to work intensively in this crisis.

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By arbitration is meant any of the processes of conciliation, mediation or arbitration which can be brought into action to stop, correct, control or isolate disputes, so they may not menace defense production or afford opportunities for the creation of confusion or divisions among the American people.

By mobilization is meant not only bringing each existing unit up to war-time efficiency, but into more effective shape for work in its own special field. The integration of such units into a compact and cooperative arrangement to promote peace on all economic fronts is the final step.

There are in the United States two far-flung but definite lines of defense against internal disputes. One is governmental and, therefore, official; the other is self-regulatory and, therefore, voluntary.

The first consists, on the industrial front, of such agencies as the National Defense Mediation Board, the U. S. Conciliation Service, the National Labor Relations Board, the National (Railway) Mediation Board, the Maritime Labor Board and a score of other agencies, all having various powers and functions for the control of disputes. Coming down the line, there are state mediation and labor boards and agencies of different kinds, and still further down are municipal agencies. While varying in power and scope, these agencies have the same objective—to eliminate as rapidly as possible the danger of disputes and to keep up goodwill and morale.

These official agencies and facilities cannot, however, be said to be mobilized. They have many generals, but no commander-in-chief; they exist in separate, self-operating units, but without coordination or direction. Were they asked tomorrow to pool their resources for a mass attack upon industrial disputes, the result would be confusion and ineffectiveness, and we have already seen what can happen to nations when their defense measures are mobilized too late, or are not coordinated.

This lack of coordination of existing agencies is partly due to the fact that they do not collectively know in advance where the enemy—disputes—is located; they do not know where the instigators of such disputes are at work. One must still depend upon the press for the disclosure of the whereabouts of disputes, for their distribution and intensity in areas of industry have never been accurately or comprehensively mapped out.

Not only are these resources not fully mobilized,—even where they exist they are inadequate.

One industry may be well protected; another may have no such protection; one state or city may have machinery or facilities, while another remains indifferent. One state or city may have labor laws of one kind and another may have laws of another kind; others may have none. Under some arbitration laws labor disputes are included; under others they are specifically excluded.

Again, one company may carry full self-insurance against labor disputes; another may have made no provisions whatever. Such uncoordinated and inadequate provisions fail to offer any full protection against disputes and their exploitation.

When we come to consider any mobilization on the other defense line—the voluntary agencies and self-regulatory facilities and provisions for disposing of labor disputes,—we are again at sea. Recently the U. S. Department of Labor started registering labor agreements and reports that in 65 per cent of them some form of machinery has been provided for the settlement of labor disputes. Outside of this meager record and those maintained by a few of the universities such as Princeton and Harvard, there appears to be no certain information concerning how industries, particularly those handling war contracts, are equipped to deal with disputes that may arise between management and men. It is, of course, impossible to mobilize, unify, train and make available even the best and most widely distributed resources without knowledge of where they are, the conditions under which they function or their adequacy to meet changing conditions under National Defense. It is equally difficult to extend or improve such resources without knowledge of where the needs lie.

In the field of commercial arbitration, thanks to the American Arbitration Association, the nation is in a somewhat better position. There is a national, uniform system which pretty generally covers the Western Hemisphere. It is centrally administered and reaches 1,600 American business centers. It commands the services of about ten thousand volunteers who, upon call, lay aside their regular occupations and assemble at the scene of the trouble to quell the disturbance. But disputes remain, because the disputants still regard the "conflagration" as their own private dispute and keep the "firemen" out.

This system, adequate as it is and potentially useful as it may become, does not, however, represent a mobilization of arbitration resources. It is like a main, well-policed roadway over which disputes may travel safely and quickly to a final conclusion. There are, however, many side roads and unprotected tributaries to this highway where danger lurks and barriers have been allowed to stand to slow up progress or wreck the unwary.

Imagine a central highway over which flow the commodities and services of America. Most of these products and services travel under contracts that condition their creation, manufacture, sale and distribution. Some are protected against disputes by the simple device of an arbitration provision in the contract. Other commodities and services have no protection whatever. Where protection is afforded, trade associations have usually taken the precaution for their members. But the vast number of non-members of such groups find themselves makers of disputes and the prey of dispute-makers. Having taken no advance precautions, they are left without any protecting bomb-proof shelter when the dispute bursts about their heads.

Since most trade associations, by reason of the limitations of commodities and memberships, are restricted in their service, there is, of course, a vast "no-man's land" in which there is no protection against disputes. Since, also, arbitration laws, upon which commercial arbitration relies for legal validity and enforcement, vary so greatly, some of the provisions in contracts that are designed to make arbitration effective are flat failures by reason of serious discrepancies in arbitration laws and technicalities and delays with which these laws fetter arbitration.

Should an effort be made to mobilize the resources of commercial arbitration, it would have a better head start than industrial arbitration, because there is a national organization with resources in 1,600 cities and with 31 branch offices, which could take the leadership. But an absence of knowledge and decentralization of forces prevails among trade associations, commercial organizations, financial institutions, insurance companies and others, which are the natural channels for mobilizing such arbitration resources.

One excellent example of the mobilization of arbitration can be found in the amusement industry—in which the theatre, motion pictures and the radio are well entrenched behind arbi-

tration provisions, which exist in contracts between actors and producers of stage plays, between dramatists and producers, between screen actors and motion picture producers, between radio artists and the broadcasting companies, with the relations between distributors and exhibitors of motion pictures also covered by a system of arbitration set up by a Consent Decree.

Nor have the legal resources of the country ever been mobilized for the elimination or control of disputes. In peace time it might make no vital difference to the nation if there were long court delays and protracted negotiations. In war time, the situation changes and with it, necessarily, the attitude of the bar. Lawyers write the majority of commercial and labor contracts; they are called upon to interpret them when a dispute arises. They represent a very substantial power to be turned in the direction of speed, economy and justice. They have a choice between being peace-makers or trouble-makers, and between safeguarding the American inner defense line or opening seams to the enemy within our borders. Today, tribunals throughout the country are generally open to lawyers for the purpose of peace making. Since it is they who include or reject arbitration provisions in contracts or who may advise clients to proceed expeditiously, their inclusion in any mobilization plan is both necessary and inevitable.

The educational resources of this country are tremendous. The schools, the churches, the societies, the radio, the movies, the public forums, the press—to mention but a few of them—constitute a vast network of such resources. Yet the idea of arbitration has never been run through them. Nor has the danger of disputes ever captured their imagination, notwithstanding that, next to war, such disputes lay the heaviest economic burden upon the country and have now reached the position of menace, as described by Miss Kellor in her article in this issue. While the right to disagree is fundamental in any free society, the obligation to control or isolate such disagreements before they injure the community or the nation is equally fundamental. Arbitration is far from being a household word, such as war and lawsuits are. Arbitration for National Defense is all but an obscure idea to the mass of educators in the country.

How, then, shall these vast resources for National Defense be mobilized? How shall the scattered facilities be brought

up to war strength and how shall they be integrated as part of a National Defense System? Where shall it begin, and how?

First, we must know the area of disputes and what facilities exist for controlling them; second, we must search out the exposed areas that have no protection and provide it; third, the total strength must be capable of being mobilized as a unit.

Mobilization must be expeditious—we may already have delayed too long. Therefore, the voluntary commercial agencies and the self-regulatory groups of labor must be the immediate channels for mobilization. There is no time to create machinery; it must be adapted to the purpose.

First, and highly important, is the vast network of trade associations, national, sectional, state and local. Scarcely an industrial city or hamlet has not some such organization that can be used to mobilize commercial arbitration or to survey the field for industrial arbitration.

This mobilization has already begun, under the direction of the Trade Association Executives of New York in collaboration with the American Arbitration Association. At a joint meeting held in early April, these two groups pledged their cooperation in helping Government agencies prevent business disputes from interfering with the National Defense program.

Thus the mobilization starts with a splendid backlog of arbitration facilities, for among the hundreds of trade groups in the United States there are some, like the National Federation of Textiles, Inc. and the Grain and Feed Dealers' National Association, that have been among the pioneers in American arbitration.[1] Others, like the Institute of Scrap Iron and Steel, the Federation of Graphic Arts and Allied Industries, the National Association of Waste Material Dealers, the National Association of Wool Manufacturers—all vital to our defense efforts—have been carrying on arbitration for their members over many years. Others, like the American Newspaper Publishers' Association, have kept their industries free of labor disputes by long-established machinery for settling disputes between members and unions of employees.

It seems especially appropriate, therefore, that trade associations should be in the vanguard of arbitration mobilization for

[1] See *Pioneers in American Arbitration*, by Fred I. Kent, 4 ARB. JOURNAL 119 (October, 1940).

the elimination of friction arising from differences of opinion in the functioning of the economic system.

Two questionnaires are being used to gather the information upon which the mobilization will be carried forward—one to secure necessary information from the trade association executive himself, the other to obtain data from the members of the trade group. The first will produce information concerning arbitration machinery available, the extent of its use, methods employed in settling commercial and industrial disputes, other existing groups to which arbitration might be extended and available men to act as conciliators, arbitrators or fact-finders. The second questionnaire to individual members of trade groups would furnish information as to those working on defense contracts, the extent of the use of arbitration clauses, and the prevalence of disputes and frequency of strikes or stoppages.

Still another move to mobilize arbitration resources is represented by the Conference Board of Impartial Chairmen, recently organized, to assemble similar arbitration facilities exclusively in the labor field, and to make known to the Government agencies the well-established voluntary arbitration machinery that already exists and is at the disposal of the National Defense Mediation Board or other agencies that have need to call upon such facilities.

Thus business is taking upon itself the responsibility of controlling economic disputes and isolating them before their venom can spread and do untold harm to defense efforts. And business and labor alone can best accomplish this in a democracy through their own voluntary organizations. They alone can control disputes at their source through arbitration provisions in commercial and labor contracts. They alone can voluntarily stop any dispute instantly by an arbitration agreement. If they will cooperate in doing their share in driving disputes out of their own factories and their own territories and in removing this menace to American economic unity and national preparedness, the drive now on in this country to divide Americans and conquer their spirit will be defeated on this segment of the inner defense line.

Enemies that are busy dividing our forces do not work alone in industrial groups and channels. You will remember that in Norway homes were divided, cities were rent asunder, man was arrayed against man long before the German army and air force

landed. Therefore, there is a job to be done by every educational, religious and humanitarian group that has contact with homes and non-business units. Theirs is the task of eliminating disputes and healing differences wherever they are found. To a nation arming for defense, these personal disputes are no more the exclusive right of the family or group than business disputes are the sole property of industry. So, too, must all of America's vast voluntary resources be organized to make a *dispute-free and a Hitler-proof America.*

CONCILIATION AND AMERICAN DEFENSE

JOHN R. STEELMAN *

THERE are two points of especial importance, I think, in connection with the creation of the National Defense Mediation Board by Executive Order of the President on March 19, 1941.

The first is that industrial relations in the United States remain today as much on a democratic and voluntary basis as before the Board was created.

The Board is authorized to seek adjustments and settlements by mediation and by an encouragement of voluntary arbitration. It is authorized also "To investigate issues between employers and employees, and practices and activities thereof, with respect to such controversy or dispute; conduct hearings, take testimony, make findings of fact, and formulate recommendations for the settlements of any such controversy or dispute; and make public such findings and recommendations whenever in the judgment of the Board the interests of industrial peace so require."

In no way, however, does creation of the Board imply entry onto the American scene of any form of compulsory arbitration.

The second point is that the Board is authorized to act only, as Section 2 of the Executive Order provides, "Whenever the Secretary of Labor certifies to the Board that any controversy or dispute has arisen between any employer (or group of employers) and any employees (or organization of employees) which threatens to burden or obstruct the production or transportation of equipment or materials essential to national defense (excluding any dispute coming within the purview of the Rail-

* Director, United States Conciliation Service.

way Labor Act as amended) and which cannot be adjusted by the Commissioners of Conciliation of the Department of Labor."

In fact, Section 4 of the Order expressly states:

> "Whenever a controversy or dispute which has not been certified to it in accordance with Section 2 is brought to the attention of the Board, it shall refer the matter to the Department of Labor."

Thus the principal and primary responsibility of working in the interests of voluntary industrial peace remains with the United States Conciliation Service.

In 1913, in the Act which created a Federal Department of Labor, Congress provided:

> "The Secretary of Labor shall have power to act as mediator and to appoint commissioners of conciliation whenever in his judgment the interests of industrial peace may require it to be done."

The United States Conciliation Service springs directly from that assignment of duty to a member of the Presidential Cabinet. It was, of course, to this assignment that President Roosevelt referred when, on signing the National Labor Relations Act, he declared:

> "The National Labor Relations Board will be an independent quasi-judicial body. It should be clearly understood that it will not act as mediator or conciliator in labor disputes. The function of mediation remains, under this Act, the duty of the Secretary of Labor and of the Conciliation Service of the Department of Labor."

As for the scope and discharge of this responsibility—since 1913, approximately 27,000 cases involving approximately 22,000,000 persons have been disposed of. During the past fiscal year, for example, the Service handled 3,751 situations in which more than 1,145,000 persons were directly involved.

Our organization set-up is a comparatively simple matter. Even today, with the greatly increased demands which are made upon us, we are striving to preserve the informality and flexibility which have always characterized the Service. It is our purpose to render assistance to management and labor as expeditiously as it is humanly possible to do so. Accordingly, we function with red tape reduced to the barest minimum.

Attached to our small headquarters staff, we now have four Regional Supervising Commissioners of Conciliation who are stationed officially in Washington. It is their job to make the regular assignments of Commissioners and to keep in close and

constant touch—by wire, by telephone, and, now and then, by personal travel—with pertinent developments in the four regions into which we have divided the country.

Our actual mediating agents—the Commissioners of Conciliation—are stationed throughout the United States, at or near the principal business and industrial centers.

We assign these Commissioners to render assistance in a situation at the request of labor, of management, or of some responsible party, such as a Governor or a Mayor. In matters of grave public concern, of course, we may of our own accord offer to help the parties work out a satisfactory settlement. It is worthy of note, however, that, although there exists no legal obligation for any person or group of persons to accept our assistance, our services have been rejected in only two instances during the past three years.

Very often, the time element is of utmost importance in the successful handling of the situations which come to the attention of the Service. In order more effectively to meet the increased demands upon our organization occasioned by the Defense Program, with its stimulation of general business activity throughout the country, the number of Commissioners of Conciliation has been increased to 110. Despite the almost obvious difficulties of servicing labor and management in all 48 states of the world's greatest industrial nation with a staff of this size, we have set for ourselves the job of furnishing assistance anywhere in the country on twelve hours' notice. I can honestly say that, with astonishingly few exceptions, we have thus far been successful in the prompt discharge of this self-imposed task.

When the National Defense Advisory Commission was established, the Secretary of Labor designated seven of our most experienced Commissioners of Conciliation to devote their full time to employer-employee problems in seven of the key defense industries. These Commissioners are, of course, helping management and labor on any dispute which may arise. But they are doing far more than that. By constant, day-to-day contact and consultation with all the interested parties, they are securing early adjustments of troublesome conditions before these conditions have had a chance to advance to more serious stages. They are working whole-heartedly, conscientiously, and, by and large, most effectively.

And, in an over-whelming majority of cases, they are obtaining the full cooperation of American labor and management in this important work.

In addition to these especially designated Conciliators, we require all our Commissioners to give complete, unqualified priority and attention to any defense matter in any industry to which we have assigned them. It is their duty to "stick" with such cases until they have helped management and labor to work out a satisfactory adjustment of the matter or matters at issue. Then, when a settlement has been achieved, they report this fact immediately to our Washington office. All our Commissioners, in fact, are required to report to us once a day, at the very least, on every situation of a defense nature.

In turn, through our liaison officers whom we have carefully selected for their knowledge of the problems involved, Conciliation Service headquarters relays all pertinent information to both the Office of Production Management of the Defense Advisory Commission and to the War or Navy Department, depending upon which is involved. In extremely difficult cases, representatives of the Office of Production Management sometimes lend us a helping hand. As the designated organization for mediating disputes and incipient disputes under the defense program, we cooperate at all times to the fullest extent with these agencies and keep them informed of the status, progress and settlement of every case in which defense is involved.

But, when I say "case," I do not necessarily mean a stoppage of operations—a lockout or a strike.

By far the majority of cases which we have handled have been adjusted in advance of any stoppage of work. It is my firm conviction, based on all my own experience and many years of experience of the Conciliation Service, that the best time to settle a strike or lockout is before it gets started.

One of the most promising trends in our whole industrial relations picture during the past few years has been a progressive shift from the older emphasis on conciliation as a remedy to the new and growing concept of conciliation as a more positive instrument of industrial peace—a concept of conciliation as a preventive of those losses which work stoppages so often entail for all the parties concerned.

Credit for this, of course, cannot be restricted to any single organization or individual. The Conciliation Service has had,

in increasing measure, the sustained cooperation of American labor organizations and business managements. Several large international unions, for example, have adopted a settled official policy of withholding strike sanction from any of their locals until we have been informed of the difficulty and had a chance to help develop an adjustment satisfactory to all the parties involved. And, throughout the country, local unions and progressive business managers call on us in the early stages of any difficulties they encounter in their work relationships. As for the results attainable with such cooperation—during all of 1940 we were able to prevent from becoming stoppages of work 95 per cent of the threatened strikes which were brought to our attention.

In the case of these threatened strikes alone, it has been estimated—on the basis of Bureau of Labor Statistics figures—that 10,000,000 man-days of production and wages were saved for the people of the United States in 1940 through an early utilization of our conciliation machinery.

And this is only part of the picture.

We classify as "threatened strikes" only those situations in which a stoppage has already been voted upon or in which we have preponderant evidence that a stoppage is imminent.

Thus this term does not include the thousands of cases—such as controversies (in which a stoppage is not immediately in prospect), requests for arbitration, informal conferences of workers and employers with members of our staff, and the rendering of technical services and information—in all of which our assistance has been made use of to adjust employer-employee problems before those problems advanced to more serious stages.

All this preventive work, together with the increasing cooperation of labor and management which is making it possible, receives, in the very nature of things, slight if any attention in the press and over the radio. But it constitutes, I believe, one of the best answers to any minority which might at any time propose that the solution for our industrial relations problems can be achieved by such straight-jacketing and regimentation as any form of compulsory arbitration would mean for management as well as labor.

The Conciliation Service, of course, functions without any power of compulsion whatever. It is not a law-enforcement

agency. It cannot tell anyone what to do. It is just what its name implies—a *service* agency, rendering assistance absolutely free of charge to management and labor all over the United States.

As for voluntary arbitration, however, the Service not only suggests it when a dispute cannot be settled by other means but has long been active in this field.

Since the very beginning in 1913, when a Commissioner of Conciliation, all mediation efforts having failed, secured a settlement of a street car strike in Indianapolis by suggesting that the parties agree to submit their differences to arbitration, the Department of Labor has evinced keen appreciation of the value of voluntary arbitration as an instrument of industrial peace. In 1917, for the first time, a Commissioner of Conciliation was designated to act as arbitrator of points in dispute between management and labor. Throughout the years since that case, Commissioners of Conciliation have served as arbitrators in situations involving almost every aspect of the employer-employee relationship.

But, in any consideration of the promise of arbitration in our efforts for peace in the industrial field, I believe we should distinguish clearly between the two principal types of case in which it may be used.

The first type of arbitration is the adjudication of some disputed interpretation or application of an existing agreement. Increasingly, in drawing up their contracts, labor and management are providing in advance that, if they themselves cannot adjust any dispute over the interpretation or application of any section, the matter will be submitted to arbitration.

Where the arbitration is to be by a board in which the parties have equal representation, great care is usually taken to guard against a stalemate in case of failure of the representatives of the parties to agree upon the impartial member of the board. Usually it is provided that, in such an event (and the event, of course, is by no means rare), the impartial member will be designated by some outside agency such as the Conciliation Service. And, where arrangements are made for adjudication by a single arbitrator, it is frequently provided that the Service, upon request, shall designate some neutral person.

We have not the research facilities, of course, to determine what the situation is with regard to the thousands of labor agree-

ments throughout the country. A recent survey of the contracts coming into our Washingon office disclosed that over 60 per cent contained arbitration provisions. And it may be significant that very few weeks go by without our being notified by the parties to some agreement that they have a misunderstanding and that, according to their agreement, which we may never have seen before, we are expected to furnish or designate an arbitrator.

In my opinion, this type of arbitration—in disputes over the interpretation or application of existing agreements—is destined for increased use and usefulness with every passing year. It constitutes, I believe, one of the most effective instruments for orderly relations between labor and management in a democracy which has legally recognized the desirability of having those relations on a collective bargaining basis. However, the greatest care should always be exercised that the parties have exhausted every means of conference and discussion between themselves before resorting to the arbitration machinery which they have provided for in their agreement.

The second principal type of arbitration is the adjudication, not of the meaning or application of an existing agreement, but of what some agreement, as yet unconcluded, shall be. Naturally, this type of arbitration can be quite valuable. It deserves careful consideration by all parties to a dispute which cannot be settled by other means.

For, of course, there are cases in which even the most untiring efforts of the best conciliator fall short of working out a final satisfactory solution of all the aspects of a controversy. In these situations—and they are comparatively rare—the parties will usually be encouraged to submit to arbitration the issue or issues upon which, even with the assistance of conciliation, they cannot come to complete agreement. They are encouraged, in short, to *agree* to arbitrate. Arbitration of this type has helped to solve many apparently deadlocked cases.

But there are limitations to its usefulness which should never be overlooked. As the Director of the oldest existing Federal agency which is concerned with labor relations (an agency which has had experience with arbitration since 1913 and active experience with it from 1917 down to the present), I am convinced that a settlement—a genuine agreement—which is reached by the disputants themselves is to be preferred to a decision

handed down by an outside party, no matter how sincere and impartial and well-informed that outside party may be.

In conciliation, the settlement reached is such a genuine agreement. It is always the actual settlement of the contending parties themselves. As such, it is the most purely democratic settlement attainable. And as such it is most likely to be a reasonable and practical settlement.

One of the most valuable things about conciliation is that it brings home to both parties, as no other method can do, their basic mutuality of interests. Neither party can regard the settlement as anything other than its own. And, from the whole conciliation process and from its fruition, both parties find it hard to avoid gaining a deeper insight into each other's needs and desires and a keener appreciation of their mutual dependence in our democracy.

ARBITRATION AND GOVERNMENT CONTRACTS *

ARBITRATION has with the aid of legislation [1] developed from an improvised and misunderstood technique into an effective method for settling disputes. Although the Federal Government has, as lawmaker, facilitated the use of arbitration and arbitration agreements by private parties,[2] it has so far denied itself the benefits of the device with respect to its own contracts. The current expansion of public spending for defense, multiplying the Government's contractual relations with private business,[3]

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[1] While every state except Oklahoma and South Dakota has enacted general statutes governing arbitration of existing controversies, the movement to provide statutory sanctions for agreements to arbitrate future disputes began with the enactment of the New York Arbitration Law in 1920. Statutes similar to that of New York have been enacted in Arizona, California, Connecticut, Louisiana, Massachusetts, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Wisconsin, Hawaii, and the United States. A Uniform Arbitration Act, which does not cover future disputes agreements, has been enacted in Nevada, North Carolina, Utah, and Wyoming.

[2] 43 STAT. 883 (1925), 9 U. S. C. § 1 *et seq.* (Supp. 1939), hereinafter referred to as ARBITRATION ACT.

[3] In December, 1940, it was estimated that 30 per cent of the plants in the United States capable of manufacturing goods for the national defense

emphasizes this defect in the procedure of federal procurement. It is the purpose of this Comment to discover whether or not the Government is denied the use of arbitration under existing law, and if so, to consider the problems which must be met before arbitration can be made available. This inquiry will be made with a view to recommending the legislative authorization that may seem necessary.

I

An arbitration agreement is an agreement to submit an existing or future controversy to a non-judicial tribunal chosen by the parties. The advantage of arbitration lies mainly in the flexibility which it provides in the adjustment of disputes typically arising under contracts for sale or construction.[4] Few public or private contracts present novel or subtle issues of law requiring judicial interpretation. Few contracting parties, on the other hand, can escape disagreement, more or less serious, over questions of the quantity and quality of materials used or sold, elements of cost in cost-plus-a-fixed-fee contracts, or the allocation of liability for delays in performance. When such disputes arise, litigation is often costly and dilatory. Arbitration refers them to a body familiar with the practices and language of the trade, ready to proceed to hearing promptly, and able to investigate the merits of a controversy without tripping over the more restrictive rules of evidence and civil procedure.[5] Involuntary delays do not appear because *ad hoc* arbitral tribunals never have crowded dockets,[6] and dilatory tactics are minimized. More-

program were working on Government contracts. Statement of Philip Murray in N. Y. Times, Dec. 18, 1940, p. 1, col. 1. See Comment (1940) 50 YALE L. J. 250, 266-285.

[4] See Sturges, *Commercial Arbitration or Court Application of Common Law Rules of Marketing* (1925) 34 YALE L. J. 480.

[5] Although generalizations are difficult because of the varying standards for arbitration proceedings applied by courts in reviewing awards, the proposition that arbitrators are not obliged to follow common law rules of evidence is generally accepted. See the discussion in Sturges, *supra* note 4, at 485.

[6] During the last fiscal year reported on by the Attorney General, the Court of Claims had 1,156 cases pending at the beginning of the year, docketed 769 cases, disposed of 331, and had 1,594 pending at the close of the year. In the district courts, 65.3 per cent of civil cases in the same period had been pending six months or over, and 17.3 per cent three years or over. REP. ATT'Y GEN. (1939) 192.

over, if court action is necessary to enforce any phase of the arbitration procedure, it can be quickly secured, since statutory arbitration agreements are enforced, and awards confirmed, vacated, or corrected, under simplified motion procedure.[7] These advantages have been widely recognized by legal and commercial groups, which have urged the passage of statutes designed to remove the common law limitations on arbitration agreements and arbitral proceedings and awards,[8] and have encouraged or compelled arbitration of disputes arising among their own members.[9] In England, where statutory arbitration has a longer history,[10] it has been estimated that less than 3 per cent of the disputes over commercial contracts are settled by litigation.[11]

When disputes arise under Government contracts, however, both the Government and the contractor are at present limited to procedures which in private dealings would be regarded as

[7] ARBITRATION ACT §§ 6, 12, 13; Cohen and Dayton, *The New Federal Arbitration Law* (1926) 12 VA. L. REV. 265.

[8] At common law courts refused to stay suits brought in violation of arbitration agreements. The doctrine that future disputes clauses are contracts void as attempts to "oust the courts of their jurisdiction" is usually traced to Vynior's Case, decided by Lord Coke in 1609, 8 Coke 80 (K. B. 1609). The language first appeared in Kill v. Hollister, 1 Wilson 129 (K. B. 1746). See Sayre, *Development of Commercial Arbitration Law* (1928) 37 YALE L. J. 595. Specific performance of agreements to arbitrate was denied on the ground that there is no lack of equity in confining parties to the courts. Kaufmann v. Liggett, 209 Pa. 87, 58 Atl. 129 (1904); Greason v. Keteltas, 17 N. Y. 491 (1858). And the award could not be reduced to judgment without suit on the award, on a penal bond given to insure performance, or on a promissory note. See STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 674. Parties may arbitrate under common law rules despite the existence of arbitration statutes, which are regarded as merely cumulative. For discussion of the relation between common law and statutory arbitrations, consult STURGES, *op. cit. supra*. The doctrine that the statutes are remedial in character has created some confusion in the application of conflicts of laws principles to arbitration agreements. See Lorenzen, *Commercial Arbitration—International and Interstate Aspects* (1934) 43 YALE L. J. 716.

[9] See Cohen and Dayton, *The New Federal Arbitration Law* (1926) 12 VA. L. REV. 265; Sayre, *Development of Commercial Arbitration Law* (1928) 37 YALE L. J. 595.

[10] 52 & 53 VICT., c. 49 (1889); 10 & 11 GEO. V., c. 81 (1920).

[11] Rosenbaum, *A Report on Commercial Arbitration in England* (1916), Bulletin XII of the American Judicature Society; see BACON, COMMERCIAL ARBITRATION AS GOVERNED BY THE LAW OF ENGLAND (1925).

cumbersome and unsatisfactory. The standard forms for Government contracts and sub-contracts now attempt to discourage litigation by including varying provisions designed to refer all disputes over questions of fact to determination by a Government representative, with a right of appeal to a designated superior official or officials.[12] Only if the specified officials fail or refuse to decide the facts, or use their powers fraudulently, has the contractor an opportunity to secure an independent examination of the controversy. Otherwise their decision binds both parties.[13] If delays are caused by the Government, the contractor must submit written notice of the facts to the contracting officer to secure remission of the liquidated damages stipulated in the contract.[14] He must sue for his own damages, however, unless an appropriation is specially provided.[15]

The desirability of referring these disputes to arbitration seems clear. It would of course reduce demands on the time of policy-forming officials now constrained to hear or otherwise dispose of appeals. But the essential fact is that an adjudication by arbitration would be more in keeping with notions of fairness than any decision by an individual official. Such unilateral de-

[12] A typical clause is Article XV in the War Department's Cost-Plus-A-Fixed-Fee Construction Contract, approved by the Assistant Secretary of War on July 12, 1940. It provides that all disputes concerning questions of fact shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Chief of Branch or his duly authorized representative, whose decision shall be final and conclusive upon both parties when the amount involved is $15,000 or less. When a larger amount is involved, the decision of the Chief of Branch can be appealed by the contractor to the Secretary of War. In the meantime the contractor must "diligently proceed with the work as directed."

[13] United States v. Gleason, 175 U. S. 588 (1900) (engineer's finding on length of "just and reasonable" delay in performance); Kihlberg v. United States, 97 U. S. 398 (1878) (distance under contract for transportation fixed by chief quartermaster); Yale & Towne Mfg. Co. v. United States, 58 Ct. Cl. 633 (1923) (proper extension of time); Brinck, Receiver v. United States, 53 Ct. Cl. 170 (1918) (quality of material).

[14] McGuire, Matters of Procedure Under Government Contracts (1935).

[15] The Court of Claims is not, like the General Accounting Office, limited to existing appropriations. See Mansfield, The Comptroller General (1939) 109. The Court has, on the other hand, declined jurisdiction of claims which could be settled by the Comptroller General. See *In re* Proposed Reference, 53 Ct. Cl. 370 (1918); *In re* Departmental Reference, 59 Ct. Cl. 813 (1924).

terminations involve many of the issues which, under private contracts, are decided by impartial bodies through litigation or arbitration. Entrusting to a contracting officer the primary decision as to whether or not that officer was responsible for delay in the performance of a contract, for instance, seems an even less desirable method for settling disputes than litigation.[16] Appeal through the hierarchy of the department to officials who know progressively less about the precise matters at issue seems an illusory safeguard,[17] as does the contractor's opportunity to persuade a court that the initial determination was fraudulent. From the Government's point of view, the experience of other public bodies which have tried arbitration suggests that, once the sovereign has shed its immunity, it need have no more to fear from independent arbiters than from an equally independent judiciary.[18]

[16] Objection has also been made that under the present system departmental decisions may involve questions of law. The theory remains that it is "the province of the courts to declare the law of the contract." Davis v. United States, 82 Ct. Cl. 334 (1936). In this case the Court of Claims held that decisions as to the meaning of the words "wiring" and "subcontractor" were questions of law. Whether the work met contract requirements, and who was liable for delay in performance, were classified as questions of "fact." The futility of such distinctions is apparent.

[17] *Cf.* Bray v. United States, 46 Ct. Cl. 132 (1911); Fitzgibbon v. United States, 52 Ct. Cl. 164 (1917).

[18] The Pennsylvania Arbitration Act is specifically made applicable to any written contract executed by the state, any of its agencies or subdivisions, or any municipal corporations. PA. STAT. (Purdon, 1936) tit. 5, §§ 176, 181; Commonwealth v. Union Paving Co., 288 Pa. 577, 136 Atl. 856 (1927). Compulsory arbitration of controversies arising from contracts of the state highway commission is provided by statute in North Dakota and in Minnesota. MINN. STAT. (1927) § 2554(17); N. D. LAWS, 1927, c. 160. Municipal corporations are generally stated to have an inherent power, incident to their power to contract, to submit to arbitration. DILLON, MUNICIPAL CORPORATIONS (4th ed. 1890) § 478; Shawneetown v. Baker, 85 Ill. 563 (1877); District Twp. of Walnut v. Rankin, 70 Iowa 65, 29 N. W. 806 (1886); Maroulas v. State Industrial Accident Comm., 117 Ore. 406, 244 Pac. 317 (1926). Iowa has carried an arbitration provision in its specifications for highway work for 25 years, under which some 40 arbitrations have been held. The Port of New York Authority and the Department of Water Supply of the City of Detroit have occasionally resorted to arbitration. The recent contract for construction of the Lake Champlain Bridge, between Crown Point, New York, and Chimney Point, Vermont, included a clause making the findings of the bridge commission's engineer on questions of time and financial consideration reviewable by

Once accepted by the Government, arbitration can perform functions broader than the adjustment of disputes under procurement contracts. Upon the cessation of hostilities in 1918, the Government needed both to dispose of surplus supplies on hand and to stop work on thousands of contracts with manufacturers. Local sales control boards headed by Army officers were set up by the War Department with broad powers to settle disputes arising over sale of supplies at auction, even to the extent of ordering refundment to purchasers where funds had not been covered into the Treasury.[19] Adequate arbitration clauses in the sales contracts would presumably have assured a more impartial and complete hearing of these controversies. In terminating contracts, the Secretary of War offered his own settlements to contractors in lieu of the remedies provided by contract, or suit for breach of contract in the Court of Claims.[20] Such settlements, involving determination of the contractors' net expenditures under the terminated contracts,[21] would also have been given fuller and more impartial consideration by arbitrators. At present, arbitration would permit decentralized and efficient determinations of similar issues under contracts to construct emergency facilities for defense production.

II

Despite the policy expressed by Congress in the United States Arbitration Act, it has been said that Government contracting

arbitration pursuant to the New York Act. White, *Arbitration Under Public Construction Contracts* (1937) 1 ARBIT. J. 149.

[19] For a description of the boards, see United States v. Koplin, 24 F. (2d) 840 (N. D. Ga. 1928).

[20] The legislation and procedure is described in *Notes on Jurisdiction of the Secretary of War to Settle Contracts and Usual Basis Used in Doing So.* (U. S. War Dep't 1920).

[21] In eight months, the Secretary settled 21,800 contracts for an aggregate sum of $272,786,000, an average of 13 per cent of the contract price. Settlements were based on cost, not on the contract price, and excluded compensation for anticipated profit. Although contractors who refused to accept the settlement offered by the War Department could sue for breach, the Department pointedly suggested that settlement was "much more favorable than litigation of so great a number of claims against the United States would be with the consequent delays, both in reaching judgments and in obtaining from Congress the appropriations to pay the same." U. S. War Dep't, *op. cit. supra* note 20, at 16.

officers are powerless to agree to arbitrate without express statutory authority. Because this opinion rests in part on grounds other than specific lack of statutory authorization, its foundations are worth investigating with some particularity.

The question was judicially considered on one occasion, in the case of *United States v. Ames*,[22] decided by the Circuit Court of Massachusetts in 1845. The Secretary of War had authorized the district attorney for Massachusetts to refer to arbitration a controversy between Ames and the Government over a dam erected by Ames which caused water to flow on Government land. An arbitration was held and an award, in part favorable to Ames, was rendered; but the then prevailing procedure for entering the award as a rule of court was not followed.[23] Later the Government sued Ames for trespass, and he pleaded the award. The precise issue was whether or not the award constituted an adequate plea in bar. In ruling the plea invalid, the court held that the Secretary's authorization to arbitrate was beyond constitutional power, since no department or officer of the Government may vest judicial power anywhere except in a court created under Article 3 of the Constitution.[24] The holding seems puzzling and inconclusive. If it was meant that only constitutional courts can judicially determine the Government's rights, the argument is no longer valid. The Court of Claims, established and judicially sustained after the *Ames* case,[25] is a legislative court exercising judicial power.[26] Nevertheless, the *Ames* case is still cited to support the proposition that the rights and liabilities of the United States may not be submitted to the adjudication of arbitrators.[27]

A second line of argument, adopted by the Judge Advocate General of the Army, is that agreements to settle by arbitration all disputes arising under a contract are void as attempts to "oust the jurisdiction" of the courts,[28] and that a Government

[22] 24 Fed. Cas. 784 (C. C. Mass. 1845).

[23] *Id.* at 789.

[24] *Ibid.*

[25] Act Feb. 24, 1855, c. 122, 10 STAT. 612; Act March 3, 1863, c. 92, 12 STAT. 765; as incorporated in 36 STAT. 1135 (1911), 28 U. S. C. § 250 (Supp. 1939). A concise history of the Court may be found in Pocono Pines Assembly Hotels Co. v. United States, 73 Ct. Cl. 447 (1932).

[26] Williams v. United States, 289 U. S. 553 (1933).

[27] 8 DEC. COMP. GEN. 96 (1928).

[28] See note 8 *supra*.

contracting officer cannot "waive the illegality" of such a clause by inserting it in a contract.[29] The basic assumption of this argument, that arbitration clauses are against public policy, was superseded by the United States Arbitration Act, which expressly declares against their invalidity and makes them irrevocable and specifically enforceable. Though this legislation may have limited application in some instances, as when parties agree to submit future disputes to a tribunal in a foreign jurisdiction,[30] no special limitations apply to the use of arbitration agreements by the United States.

The most stubborn opposition to proposals for arbitration by the United States has appeared in the deliberations of the Comptroller General.[31] More precisely, that officer has ruled that the Government cannot be charged with the expenses of an arbitration for which there has been no appropriation by Congress.[32] Reliance was had upon a 1909 statute [33] prohibiting the use of Treasury funds for the expenses of unauthorized boards and commissions.[34] The legal effect of his decision might be technically avoided by an agreement which would charge the contractor with the expenses of the arbitration. But the Comptroller General's strategic power over disbursements, enhanced by the circumstance that they are imperfectly defined, has given

[29] Digest of Opinions of the Judge Advocate General, 1912-30, 410 (May 5, 1919), 164 (Apr. 14, 1920). The Attorney General, in disapproving a contract giving a power company an unlimited option to purchase a government plant and containing other clauses unfavorable to the government, expressed his opinion that a provision for the "arbitration" (*i.e.*, appraisal) of the price to be paid was unenforceable. 33 OPS. ATT'Y GEN. 160 (Daugherty, 1922).

[30] The Edam, 27 F. Supp. 8 (S. D. N. Y. 1939) ("all disputes to be submitted to the determination of the competent court at Rotterdam" held not an arbitration clause).

[31] 8 DEC. COMP. GEN. 96 (1928); 7 DEC. COMP. GEN. 541 (1928); 6 DEC. COMP. GEN. 140 (1926); 5 DEC. COMP. GEN. 417 (1925).

[32] See decisions cited *supra* note 31.

[33] 35 STAT. 1027 (1909), 31 U. S. C. § 673 (Supp. 1939).

[34] 43 CONG. REC. 3118, 3119 (1909). Its sponsor complained of the "great number of commissions that are now in existence (that) have been working under authority from the executive department alone." The measure was modified to substitute the words "authorized by law" for "authorized by Congress." The statute also forbids the detailing of regular government employees to unauthorized commissions.

at least an *in terrorem* persuasiveness to his broader statements that agreements to arbitrate would be invalid unless authorized by statutes.[35] The Comptroller General has expressed this view in disapproving contracts containing limited future disputes clauses which were submitted to him by the Secretary of War [36] and the Secretary of Commerce.[37] He rejected the argument that the general authorization of the Secretary of Commerce to acquire leases "under terms customary in the oil and gas industry" included power to agree to arbitration of disputes over the value of gas rights and the cost of drilling wells.[38]

Although it would seem that none of these arguments conclusively establishes the necessity for statutory authorization to arbitrate, in practical effect they have proved a formidable deterrent to experiment. Understandable inhibitions have stood in the way of bringing the question to a court test. If the contract is awarded by bid, the bidder may have little opportunity to shape the terms of the bargain. Even if it is awarded by negotiation,[39] private contractors and Government contracting officers are inclined to accede to opinions held by Government legal or accounting departments. On the assumption, therefore, that specific statutory authorization is desirable as a practical matter if not as a legal necessity, it is proposed to discuss the problems such authorization may raise.

[35] For criticism of the Comptroller General's powers, see MANSFIELD, THE COMPTROLLER GENERAL (1939) *passim*.

[36] 7 DEC. COMP. GEN. 541 (1928). In this opinion the Comptroller General advised the Secretary of War that a clause in a lease by the War Department of power generating facilities, providing for arbitration of disputes by three arbitrators, one to be chosen by the War Department, one by the power company, and the third by the two so designated, was not within the Secretary's authority.

[37] 8 DEC. COMP. GEN. 96 (1928).

[38] The *Ames* case was cited to sustain his position. 8 DEC. COMP. GEN. 96 (1928).

[39] Permitted by certain recent appropriation measures. Pub. L. No. 781, 76th Cong., 3d Sess. (Sept. 9, 1940); Pub. L. No. 667, 76th Cong., 3d Sess. (June 26, 1940); Pub. L. No. 671, 76th Cong., 3d Sess. (June 28, 1940) § 2(a); Pub. L. No. 703, 76th Cong., 3d Sess. (July 2, 1940) §§ 1(a), 1(b) 5; Pub. L. No. 588, 76th Cong., 3d Sess. (June 11, 1940).

III

Since Congress may provide for the adjustment of claims by [40] and against [41] the Government and regulate the manner of their determination, it may unquestionably authorize the adjustment of both classes of claims by arbitration. The power of Congress to provide for the enforcement of claims by or against the Government in regulating the jurisdiction of the federal courts is also clear.[42] The form of statutory authorization for arbitration presents, therefore, not problems of power, but problems of policy.

The first problem seems to be whether authority to arbitrate should be conferred specially or generally. Special authorizations could be included in the individual statutes creating each of the Government agencies, or in particular appropriation measures.[43] Congress would thus have to consider separately each agency and department and any possible reasons peculiar to it for avoid-

[40] Power to compromise unliquidated claims is exercised by the Attorney General, the Secretary of the Treasury, and the Commissioner of Internal Revenue. REV. STAT. § 3469 (1875), 31 U. S. C. § 194 (Supp. 1939); 53 STAT. 508 (1939), 15 U. S. C. § 728 (Supp. 1939); Executive Order No. 6166, June 10, 1933. The Attorney General possesses the general power of an attorney conducting a suit to dismiss, discontinue, or compromise government suits. See 38 OPS. ATT'Y GEN. 125 (1934).

[41] See note 25 *supra*. On claims up to $10,000, the district courts exercise jurisdiction concurrently with the Court of Claims. 36 STAT. 1093 (1911), 28 U. S. C. § 41 (20) (Supp. 1939). The General Accounting Office has limited powers of settlement. 42 STAT. 24 (1921), 31 U. S. C. § 71 (Supp. 1939).

[42] See notes 25 and 41 *supra*.

[43] The United States Shipping Board and any other government agency operating a merchant vessel may "arbitrate, compromise, or settle" a libel *in personam* or a suit for salvage services rendered by the vessel. 41 STAT. 527 (1920), 46 U. S. C. § 749 (Supp. 1939). The word "arbitrate" in this statute has not been judicially defined. The criminal code contains a provision that any disputes as to the "price, quality, suitability or character" of products manufactured in a prison industry for a Government department shall be arbitrated by a board consisting of the Comptroller General of the United States, the Superintendent of Supplies of the General Supply Committee, and the Chief of the United States Bureau of Efficiency, or their representatives. 46 STAT. 392 (1930), 18 U. S. C. § 744(g) (Supp. 1939). The General Supply Committee was abolished by Executive Order of June 10, 1933, No. 6166, § 1. The Bureau of Efficiency has been abolished by Congress. 47 STAT. 1519 (1933).

ing, or limiting, resort to arbitration.[44] The alternative is a general authorization by amendment to the United States Arbitration Act which would make its provisions available to Government contracting officers. This method would seem to be far more expedient.

It seems desirable, if a general authorization is conferred, that contracting officers be left to determine the extent to which they will employ arbitration, both as to the type of contracts affected and as to the scope of the arbitration agreements. The authorization proposed is therefore permissive rather than mandatory. While this vesting of discretion might enable administrative standpatters to deny arbitration to contractors who would have no legal standing to compel it, the disadvantages of discretion seem to be outweighed by those which would attend a blanket Congressional order to arbitrate. Such an order might well discredit the remedy by exposing to mandamus proceedings[45] officers who had good reason to avoid arbitration in a particular case. And once the existing obstacles to arbitration had been removed, administrative responsibility would be better served by allowing officers a freedom of experiment and adaptation in discovering feasible uses and desirable limitations.

In leaving to contracting officers the definition of the scope of the agreement, the proposed general authorization would permit them to include within it any matters which could be included in such an agreement between private parties.[46] There should be no difficulty in defining the scope of an existing controversy submitted to arbitration.[47] Courts have sometimes interpreted future

[44] Officials may prefer to reserve for litigation contracts involving very large sums, feeling that the publicity that would be attracted by a large award adverse to the Government might expose them to criticism. See White, *Arbitration Under Public Construction Contracts* (1937) 1 ARBIT. J. 149, 151.

[45] Miguel v. McCarl, 291 U. S. 442 (1934); see note 75 *infra*.

[46] The United States Arbitration Act excludes from its scope "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." ARBITRATION ACT § 1.

[47] This would be the case where disagreement arose over a contract not containing a future disputes clause, and it were desired to submit the controversy to arbitration. Under statutes prescribing separate formalities for future disputes clauses and agreements to submit existing controversies, the argument may be made that submission agreements must be executed for each dispute arising under a future disputes clause. The United States

disputes agreements liberally,[48] however, and officers desiring to limit their scope should do so with nicety. What exceptions are desirable, and how completely arbitrators should displace courts and other agencies in adjudicating public rights, are questions depending on general considerations of policy and convenience.[49] Since the Government in its commercial dealings is considered a ward of the court,[50] its officers might be protected from the consequences of defective draftsmanship; but contractors would not enjoy any such protection. Fairness suggests the desirability of drawing on the many expert sources available [51] to aid in the drafting of suitable standard forms for arbitration agreements, similar to those now in use for other Government contracts.[52]

No doubt of the individual agent's authority to arbitrate should exist when a future disputes clause appears in a contract, if it is countersigned by a superior officer. This is a usual requirement to prevent execution by agents without actual authority.[53] An agreement attempted by parol would be nugatory under the

Act, however, does not prescribe separate formalities. See STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 324-328.

[48] Connor v. Simpson, 104 Pa. 440 (1883); Clark & Sons v. Pittsburgh, 217 Pa. 46, 66 Atl. 154 (1907). But *cf.* Young v. Crescent Dev. Co., 240 N. Y. 244, 148 N. E. 510 (1925); Smith Fireproof Const. Co. v. Thompson-Starrett Co., 247 N. Y. 277, 160 N. E. 369 (1928).

[49] See note 44 *supra.*

[50] Wilber Nat. Bank v. United States, 294 U. S. 120, 123 (1935); United States v. Verdier, 164 U. S. 213 (1896). Justice Holmes' statement of the policy underlying the doctrine is characteristic: "Men must turn square corners when they deal with the government." Rock Island, A. & L. R. R. v. United States, 254 U. S. 141, 143 (1920).

[51] The American Arbitration Association, notably, has developed advisory facilities for arbitrations. See Parker, *Arbitration Under the Standard Documents of the American Institute of Architects* (1937) 1 ARBIT. J. 134.

[52] "As the situation is today, there is very little dispute under the standard forms of contracts except as to the facts . . . ." MCGUIRE, MATTERS OF PROCEDURE UNDER GOVERNMENT CONTRACTS (1935) 22.

[53] For a discussion of the departmental procedures involving approval by superior officers, see SHEALEY, GOVERNMENT CONTRACTS (1938) 311-315. Government agents have no apparent authority. Utah Power & Light Co. v. United States, 243 U. S. 389, 409 (1917); Sutton v. United States, 256 U. S. 575 (1921); Filor v. United States, 9 Wall. 45 (U. S. 1869). An exception to the rule is allowed when the United States becomes a party to commercial paper; it then stands in the shoes of a private person. United States v. Guaranty Trust Co., 293 U. S. 340 (1934).

Arbitration Act, since only written agreements are enforceable under its provisions.[54]

A workable method of meeting the expenses of an arbitration to which the Government is a party should not be difficult to find. In general, the authority of arbitrators is derived from and limited by the arbitration agreement.[55] Incident to their authority to make an award, however, they may have the power to provide compensation for themselves,[56] retaining the award as security,[57] and to divide the expenses of the arbitration between the parties.[58] Analogizing the expenses of the arbitration to court costs, it would seem that a Government agency established with a "sue and be sued" clause,[59] which might therefore be held liable for costs,[60] would be taxable for its proper share of the arbitration expenses.[61] The principle that the United States as sovereign never pays costs has been modified by the Tucker Act, which provides that a prevailing claimant in the Court of Claims may have his costs.[62] Assuming that a uniform rule for costs and

[54] ARBITRATION ACT, § 1. In general, a contract required to be in writing by REV. STAT. § 3744 (1875), 41 U. S. C. § 16 (Supp. 1939), if not performed, cannot be sued upon by the contractor. Gruber v. United States, 60 Ct. Cl. 222 (1925); Rome Brass & Copper Co. v. United States, 60 Ct. Cl. 280 (1925). The government may waive the informality and sue. United States v. New York & P. R. S. S. Co., 239 U. S. 88 (1915). If, after performance, the government refuses to perfect the contract, the contractor may sue for the value of his goods or services. Clark v. United States, 95 U. S. 539 (1877); Moran Bros. v. United States, 39 Ct. Cl. 486 (1904).

[55] See STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 144.

[56] Alling v. Munson, 2 Conn. 691 (1818); Strang v. Ferguson, 14 Johns. 161 (N. Y. 1817); Tri-State Transp. Co. v. Stearns Bros., 195 N. C. 720, 143 S. E. 473 (1928).

[57] Withholding the award beyond the date required for delivery has been held not to affect its validity. Willard v. Bickford, 39 N. H. 536 (1859); New York Lumber & Wood Working Co. v. Schneider, 119 N. Y. 475, 24 N. E. 4 (1890); STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 612.

[58] See note 56 *supra;* STURGES, *op. cit. supra* note 57, at 611.

[59] Forty government-owned corporations have the clause. See Keifer & Keifer v. RFC, 306 U. S. 381, 390 (1939).

[60] RFC v. J. G. Menihan Corp., 111 F. (2d) 940 (C. C. A. 2d, 1940), *cert. granted,* 61 S. Ct. 126 (1940), 8 U. OF CHI. L. REV. 154.

[61] *Cf.* United States v. Shaw, 309 U. S. 495 (1940); United States v. Verdier, 164 U. S. 213, 219 (1896).

[62] 24 STAT. 508 (1887), 36 STAT. 1138 (1911), 28 U. S. C. § 258 (Supp. 1939).

arbitration expenses is desirable, its application may be left to the court confirming the award.

The simplest solution for the payment of arbitrators might be to stipulate in all cases that their compensation be paid by the private contractor, since this method would require neither specific appropriation for arbitrators nor authorization to pay them from general funds. An equitable compromise would be to require each party to pay the fee of the arbitrator it selected. The arbitrator chosen by the Government could then be drawn from persons already on its payroll. If the arbitrators failed to agree, and appointed a third arbitrator or umpire, his fee could be paid by the contractor, unless he, too, were drawn from regular Government personnel.[63] Such an arrangement would eliminate the necessity for further action by Congress, and would dissuade contractors from invoking arbitration over minor disputes. Departments contemplating other methods of payment could avoid possible difficulty with the General Accounting Office [64] by including in their budgetary requisitions a fund for the compensation of arbitrators.

IV

Arbitration agreements in Government contracts would be irrevocable and enforceable in federal courts under the United States Arbitration Act.[65] They would, however, be subject to the normal requirements of federal jurisdiction.

No difficulty should appear in staying suits brought in violation of an agreement to arbitrate. The United States would bring such a suit in a federal district court with jurisdiction over the defendant's person.[66] The contractor could sue the United States on a contract claim only in the Court of Claims, or, if the matter

[63] That one, or even two, of the arbitrators would thus be Government officials would not appear sufficient to vitiate the arbitration. *Cf.* Commonwealth v. Union Paving Co., 288 Pa. 577, 136 Atl. 856 (1927), and cases there cited. This fact might, however, affect the arbitration's impartiality, unless the second Government arbitrator were drawn from another department.

[64] See notes 15 and 35 *supra.*

[65] Government agreements would qualify under the Act as agreements in contracts covering commerce between a state and the District of Columbia, or under the provision extending the benefits of the Act to commerce within the District. ARBITRATION ACT, § 1.

[66] 36 STAT. 1091 (1911), 28 U. S. C. § 41(1) (Supp. 1939).

in controversy were less than $10,000, in the federal district court.[67] Suit in either case could be stayed on application to the court under Section 3 of the Arbitration Act.[68]

If, however, either the contractor or the Government, without bringing suit, refused to proceed to arbitration, a different problem would arise. A party aggrieved by the other's failure to arbitrate may, under Section 4 of the Arbitration Act, seek specific performance in any court of the United States which would have jurisdiction under the Judicial Code of a suit arising between the parties.[69] The suits that might arise between the Government and a private contractor fall into three jurisdictional categories. The Court of Claims and the district courts have concurrent jurisdiction of contract suits against the Government where the matter in controversy is less than $10,000.[70] Where it exceeds that figure, the Court of Claims has exclusive jurisdiction.[71] Finally, the district courts have jurisdiction of any suit brought by the Government.[72] Two interpretations of Section 4 would be possible. If the Court of Claims is not considered a court of the United States exercising jurisdiction under the Judicial Code, specific performance of the agreement to arbitrate could be sought only in the district courts.[73] Presumably they would not be subject to the maximum jurisdictional amount of $10,000, since the suit would not be one for a money judgment against the Government. If the Court of Claims is considered a court of the United States within the meaning of Section 4, it, too, could grant specific performance. As a practical matter, there would seem to be no necessity to adopt this interpretation. Its only purpose would be to make available a court which could exercise jurisdiction over Government officers in the District of Columbia.[74] For this purpose, the District Court of the District

[67] 36 STAT. 1093 (1911), 28 U. S. C. § 41(20) (Supp. 1939).
[68] ARBITRATION ACT, § 3.
[69] ARBITRATION ACT, § 4.
[70] 36 STAT. 1093 (1911), 28 U. S. C. § 41(20) (Supp. 1939).
[71] 36 STAT. 1093 (1911), 28 U. S. C. § 41(20) (Supp. 1939).
[72] 36 STAT. 1091 (1911), 28 U. S. C. § 41(1) (Supp. 1939).
[73] For a discussion of jurisdictional requirements under Section 4, see STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 950.
[74] In general, it is unwise to proceed against government officers on the assumption that their superiors are not necessary parties. Litigants making the assumption in suits for injunctions, in order to avoid suing in the

of Columbia would be as satisfactory as the Court of Claims. If the Government official failed to appoint an arbitrator, without denying the existence or applicability of the arbitration agreement, this court under Section 5 of the Act could itself appoint an arbitrator or arbitrators.[75] Proceedings under either section against a recalcitrant contractor could be had in his own district.

The Act provides that parties to an agreement may stipulate that judgment be entered on the award and may specify the court to which application may be made for such judgment.[76] Instead of specifying a court in the agreement, the simpler practice would be to apply to the Court of Claims to confirm awards of more than $10,000 against the Government, to the district courts or the Court of Claims for smaller awards, and to the district courts for all awards in favor of the Government. Courts would be required to confirm the award on application unless it were vacated, modified, or corrected as the Act prescribes.[77]

The Government's rights would be amply protected under the existing provisions of the Arbitration Act. Motion to vacate would enable the court to set aside an award if it had been procured by corruption or fraud, if the arbitrators were guilty of misconduct, exceeded their powers, or failed to execute a "mutual, final, and definite" award upon the subject matter of the submitted dispute.[78] Mistakes, miscalculations and other formal defects in the award could be corrected on motion.[79]

V

To extend the provisions of the United States Arbitration Act to agreements executed by Government officers, no far-reaching changes in the statute seem necessary. Language of the following general tenor would seem to encompass the major pertinent objectives:

> Any officer of the United States, or of a department or agency thereof, authorized to enter into a written contract on behalf of the

District of Columbia, may be met by a holding that the superior is a necessary party and that the Court has no jurisdiction over his person, resulting in dismissal of the suit. Gnerich v. Rutter, 265 U. S. 388 (1924); Eastman v. United States, 28 F. Supp. 807 (W. D. Wash. 1939).

[75] ARBITRATION ACT, § 5.
[76] ARBITRATION ACT, § 9.
[77] ARBITRATION ACT, § 9.
[78] Arbitration Act, § 10.
[79] Arbitration Act, § 11.

United States Government or such department or agency, may agree to settle by arbitration a controversy thereafter arising out of or with respect to such contract, or to submit to arbitration any existing controversy arising out of or with respect to such a contract. Such an agreement shall be subject to the provisions of the United States Arbitration Act.

THE EFFECT OF THE WAR ON LABOR ARBITRATION IN EUROPE

I. BESSLING *

THE fate of labor arbitration in Europe, like that of all other social institutions which are founded on free collaboration between the parties concerned, will undoubtedly depend on the outcome of the war. If the dictatorial powers were to be victorious, there can be no question but that the German system of authoritarian regulation of wages and conditions of employment would be imposed on every European country, just as it is in force today in the countries which are already under German domination. And the victory of Great Britain and the democratic countries will equally certainly mean the maintenance of the system of arbitration in strengthened form, better adjusted to the part it will have to play after the war.

That is the conclusion which can be drawn after a year and a half of conflict.

To measure the importance of the changes which the war has already produced and is likely to produce in arbitration systems, it would be necessary to analyse the situation that prevailed in Europe before the war. But since it is clearly impossible to make even a brief examination of the regulations of some thirty free and independent countries in Europe, all of which possessed conciliation and arbitration systems, it may be sufficient here to indicate in outline the two contrasting systems that are now in existence; the system of the authoritarian countries and the British system.

I

In the dictatorial countries, arbitration has always formed no more than an instrument of Government wage policy. The con-

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trol of wages is merely a part of the machinery for controlling the national economy as a whole. The reason is that the totalitarian countries considered the stability of wages and of prices to be a *sine qua non* for their policy of economic and military expansion. They, therefore, found it necessary to use every means to prevent the parties directly concerned from bringing any form of pressure to bear on the determination of wages and conditions of employment.

It follows that both in Germany and in Italy the regulation of wages and conditions of work entails in the first place a total prohibition of the right to strike and lockout or to adopt any other form of trade union pressure, however legitimate the end in view. Breaches of this prohibition are treated as crimes against the national community and are punished, not only by very heavy penalties, but also by depriving the offenders in practice of the right to engage in an industry or occupation. The prohibition is thus enforced by every means of constraint at the disposal of the State.

A second feature of the system of regulation, at least in Germany, is the total abolition of employers' and workers' organizations, and consequently the abolition of the system of freely concluded collective agreements. Government officials, described as labor trustees, fix not only the minimum but also the maximum conditions of employment and wages, in accordance with instructions given them by the central authorities and in conformity with the general policy of the Government.

In Italy, official associations of employers and workers, which are formed under Government auspices, possess a monopoly right to represent the different industries and occupations, even though no more than one-tenth of the persons engaged in the industry or occupation are members. They possess the exclusive right to conclude collective agreements, which are automatically applicable to the whole industry or occupation. The mere fact that the associations are official bodies which are subject to Government control and act only on its instructions means that the agreements reached are not collective agreements in the true sense, but wage regulations promulgated by the Government through them.

Collective disputes are settled from above by labor courts, from the point of view of the interests of the State.

Thus in both countries the Government's control of the determination of conditions of employment is complete, and employers and workers have no influence at all over so vital a matter as the fixing of wages. They have no assurance that the level of wages is in conformity with the economic situation and represents a legitimate share of the national income.

But in consequence of this policy, the Government has been in a position to control wage movements even at a time when there was an acute shortage of labor. The German statistics show that from 1933 to the end of 1939 the cost of living increased by only 6 points, from 77 to 83, and that of foodstuffs by only 5 points, from 73 to 78 (base: 1929=100); the hourly rates of wages remained stable during the same period, and the index numbers of both money wages and real wages showed only very slight fluctuations. There can be no doubt that in the field of wage policy coercion has been used to serve the economic and political ends of the totalitarian Governments.[1]

Now this is the system which has been applied in every European country that has fallen under the direct or indirect domination of the dictatorial countries. Thus in Czecho-Slovakia, Poland, Norway, Luxemburg, Belgium and the Netherlands, employers' and workers' organizations have been abolished or have voluntarily ceased to function or have been provisionally replaced by bodies which are completely at the service of the German authorities in occupation of the country. The abolition of freedom of association and the right to strike has naturally led to the abolition of collective bargaining and of conciliation and arbitration. So far, the new regulations introduced in place of these systems are few, but wherever they are to be found they have been modelled exactly on the German regulations.

In Belgium, an Order of August 1, 1940, prohibits even retroactively any increase on the rates of wages and salaries in operation on May 10, 1940, the date of the invasion of the country by Germany. A Prices and Wages Commissariat, set up by an Order of August 20, 1940, controls all movements of wages and prices.

Similarly, in occupied France, the former organizations of employers and workers, in particular the General Confederation

[1] For further details on German wage policy, *cf.* INTERNATIONAL LABOUR REVIEW: *Some Aspects of German Social Policy under the National-Socialist Régime*, Vol. XLIII, No. 2, February, 1941.

of French Production and the General Confederation of Labour, have been suppressed. Their place has been taken by industrial organizing committees, which are composed of persons appointed by the central authority and are responsible, under the direction of the Ministry of Labour, for controlling production, prices, and wages.

Even in Denmark, where free institutions (in particular, Parliament and employers' and workers' organizations) have been maintained provisionally, an Industrial Relations Act of September 14, 1940, suspended the existing regulations on conciliation and arbitration and prohibited practically all labor disputes.

When it is remembered, further, that all the Balkan countries, on the one hand, and Portugal and Spain, on the other, had previously modelled their system for the organization of industrial relations on those of the dictatorial countries (in particular, the Italian system), it is evident that practically every country of the European continent, except Sweden and Switzerland, has today adopted the totalitarian system of wage control. This wage policy, which has gradually been extended to the whole of a continent, is but a necessary corollary of the economic policy of the dictatorial powers, whose avowed object is to organize the whole of European economy in terms of the national economy of Germany.

But what is perhaps more serious from the social point of view is that, as regards wages, the dictatorial Governments have introduced a sort of racial differentiation between victors and vanquished. The measures recently adopted in Poland, as described in the German press, are particularly revealing in this respect. It appears that in the Polish territories occupied by Germany differential rates of wages have been established for German and for Polish agricultural workers on the pretext that the German worker "is accustomed to a higher standard of living than that of the Polish worker." According to the German press, the same system could not be adopted for industry owing to the fact that many employers would rather engage cheap Polish labor than better-paid German labor. But Polish industrial workers are required under various German Orders to pay from 15 to 20 per cent of their wages to the German Government. Similar measures are in force in several other of the occupied countries.

It is no doubt in the light of these facts that one should interpret the statement of the Minister for Economic Affairs in Germany, according to whom "European economy must be organized in such a way as to raise the standard of living of all classes of *the German population.*"

II

The system of regulation of labor disputes in Great Britain is based on an altogether different conception. The responsibility for determining wages and other conditions of work lies not with the Government but with the parties themselves, that is to say, with organizations of employers and workers which have been freely formed and which are also free to make use, if they think fit, of means of collective pressure, the strike and the lockout. It has been the constant policy of the British Government to avoid intervention in industrial relations. The Trade Union Act of 1871 had given a lead in this direction by stipulating that nothing in the Act should enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of agreements between members of a trade union or between trade unions, that is, collective agreements. This legislative provision was intended to indicate to the parties that they themselves must assume full responsibility for organizing their mutual relationships without counting on the intervention or support of the authorities. It is well known that the British system of industrial relations, set up by the parties themselves without any intervention on the part of the public authorities, was one of the most firmly established and highly developed systems in the world. It provided for conciliation and arbitration in several stages (local, regional and national) for every industry, the parties being bound to have recourse to this procedure before declaring a strike or lockout.

Side by side with this system of arbitration under agreements, the Government, under the Acts of 1896 and 1919, had provided machinery—a Permanent Industrial Court and courts of inquiry—to which the parties might have recourse if the voluntary negotiations between them failed. Under this legislation the Minister of Labour, with the consent of both parties, might refer the dispute to the Permanent Industrial Court, or to a board of

arbitration, or to one or more persons appointed for the purpose, and the decision was taken after an inquiry into the conditions of production and labor in the industry concerned. The awards given were not binding, but as a rule they were accepted voluntarily by the parties.

During the first ten months of the war Great Britain continued to abide by its voluntary peace-time procedure, and the Government showed complete confidence that the sense of responsibility of the parties would lead them to take account of the requirements of national defense in their voluntary negotiations for the fixing of wages and conditions of employment. In the long run, however, the absence of a wartime wage policy meant a risk of serious consequences both to the parties and to the national economy. The reasons for which the Government decided to introduce compulsory arbitration on July 18, 1940, are briefly as follows:

The rather rapid rise in prices, and therefore in the cost of living, inevitably led to several collective disputes, most of which, it may be added, were settled without recourse to a strike or lockout. But the wage adjustments made for the workers—which were very unequally spread among the different occupations—did not compensate for the rise in the cost of living, as may be seen from the following figures, showing the changes in the index numbers of the cost of living, money wages, and real wages between September 1, 1939, the date of the outbreak of hostilities, and July 1, 1940, the month in which compulsory arbitration was introduced.

	Index numbers		
Date	Cost of living	Money wages	Real wages
Sept. 1, 1939	123	104	113
July 1, 1940	155	119	107.5
Difference	+32	+15	−5.5

Thus the experience of the first months of the war showed that in wartime the free determination of conditions of work tends to be unfavorable to the workers.

There were yet other reasons for a change of policy. As the war continued, the Government found it necessary to make the national economy as a whole serve the purposes of war production and to establish increasingly strict control over production,

prices and wages. Consequently, when labor, especially skilled labor, began to be scarce in certain occupations and a certain shortage of consumers' goods began to be felt, it would have been dangerous to leave the fixing of wages and prices entirely to the free play of supply and demand.

Lastly, and quite apart from these economic considerations, a country which is at war cannot allow the regularity and continuity of work to be interrupted by labor disputes. As Mr. Bevin, the Minister of Labour, stated, the workers are no longer dealing with their employers but with the Government.

A modification of the system was, therefore, necessary in the interests of the organizations themselves as well as of the State. But, and this is a point of particular importance, the initiative was taken by the organizations of employers and workers themselves, although they are traditionally opposed to all State intervention. It was in fact on a recommendation made unanimously by the National Joint Advisory Council, which consists of representatives of the British Employers' Confederation and the Trades Union Congress, that the Minister of Labour issued the Conditions of Employment and National Arbitration Order of July 18, 1940, in virtue of the Defense Regulations, 1939.

This Order provides for the establishment of a National Arbitration Tribunal consisting of five members, three of whom are appointed by the Government, while the two other members are chosen for each case from two panels of representatives of the employers' and workers' organizations.

The principles of the measure may be summarized as follows:—

(1) The Order retains and requires the full use of voluntary joint arrangements for the settlement of labor disputes, but sets up a National Arbitration Tribunal to which any such disputes reported to the Minister and not otherwise settled will be referred.

(2) Strikes and lockouts are prohibited unless the dispute has been reported to the Minister and twenty-one days have elapsed without reference of the dispute by the Minister for settlement in accordance with the Order.

(3) The Order requires the observance by all employers of terms and conditions of employment not less favorable than "recognized terms and conditions"; these are defined as "terms

and conditions of employment which have been settled by machinery of negotiation or arbitration to which the parties are organizations of employers and trade unions representative respectively of substantial proportions of the employers and workers" engaged in the trade or industry in the district concerned. Provision is made for the reference to the National Arbitration Tribunal of any question as to the meaning of recognized terms and conditions in a particular case if such a question is reported to the Minister by an employers' organization or trade union which habitually takes part in the settlement of wages and working conditions in the trade or industry concerned.

(4) The Order lays down procedure under which memoranda recording particulars of trade practices and departures therefrom may be made by employers, employers' organizations and trade unions, and duly authorized officers of the Ministry of Labour and National Service and deposited at a local office of the Ministry where the memoranda may be consulted by those interested.

The National Arbitration Tribunal, which has already dealt with some fifty cases of dispute, has sufficient power to control wage movements in wartime.

There can be no doubt that the support given by the British organizations of employers and workers to the system of compulsory arbitration is due to the fact that the Government has associated them very closely with all its economic measures. They consequently share the responsibility for national defense with the Government, and can, therefore, be certain that the interests which they were created to protect are safeguarded as much as is compatible with the general interests of a country at war.

III

Such, in brief, are the two systems of arbitration of labor disputes which at present exist in Europe: the system of authoritarian regulation prevailing on the Continent; and the British system of compulsory arbitration voluntarily accepted. Only the outcome of the war will decide whether arbitration based on the free collaboration of the parties will survive in Europe. But we are firmly convinced that in the long run free collaboration will prove a stronger bond than coercion, between classes as between nations.

The system of compulsory arbitration in Great Britain was devised only as a wartime measure. But it will probably survive after the war, since post-war reconstruction will raise problems as urgent as those now being faced. For the same reason it will also be necessary in the countries of the European Continent, once they have been set free from German domination.

Actual experience gained during the war will have helped substantially towards raising the problem of arbitration in its real form. Strikes and lockouts (these miniature civil wars) are like wars between nations, both in their motives and in their consequences, a fact that shows more than all else how deep-seated a lack of equilibrium exists in democratic societies. The problem of the settlement of industrial disputes is at bottom the same as that of wars between nations. As the example of Great Britain has shown, it can be solved only by the collaboration of all parties which are engaged jointly in the production and distribution of goods.

ARBITRATION IN THE MOTION PICTURE INDUSTRY

ENFORCEMENT OF THE CONSENT DECREE *

FROM the standpoint of development of anti-trust law, perhaps the most significant single feature of the decree is the delegation of its primary enforcement to an independent arbitration tribunal under the aegis of the experienced American Arbitration Association.[88] Power to invoke this remedy rests solely with exhibitor complainants not party to the original anti-trust action or in any way bound by the contents of the decree.[89] By this procedure,[90]

* A reprint of that portion of a Comment on *Legislation by Consent in the Motion Picture Industry* in YALE LAW JOURNAL, Vol. 50, No. 5 (March, 1941) dealing with *Enforcement*. Reproduced through the courtesy and with the permission of the Editor.

[88] Attacks have recently been made on the arbitration machinery because of its supposedly ignorant "outside arbitration." Motion Picture Theater Owners of America, General Bulletin, Nov. 26, 1940, p. 2. Such arguments seem hardly justified in view of continuous suspicions which have accompanied "bi-partisan" attempts at arbitration in the industry. See LEWIS, THE MOTION PICTURE INDUSTRY (1933) 71-93 (arbitration under the Standard Exhibition Contract); NIZER, NEW COURTS OF INDUSTRY (1935) 103, 134 *et seq.* The American Arbitration Association, moreover, has a long record of coming in successfully to police industries whose peculiar trade practices were at first unknown to the Association.

[89] Arbitration is provided to settle all claims of violation of the Act other than those arising under § 11 (see note 83 *supra*), and the prohibition of § 5 against including theaters located in different exchange districts in licenses of theaters of any one district. The machinery for arbitration is set out in some detail in § 22, and in the more elaborate Rules of Arbitration and Appeals, filed with the decree. See Warburg, *Administration of the Motion Picture Arbitration System* (1941) 5 ARB. J. 42.

[90] Arbitration is not new in the Motion Picture Industry. It was first instituted on a compulsory basis as a means for the enforcement of the Standard Exhibition Contract, which was held illegal because violation of the arbitration provisions by any exhibitor led to a mandatory boycott against him by all distributors. United States v. Paramount Famous Lasky Corp., 34 F. (2d) 984 (S. D. N. Y. 1929), *aff'd*, 282 U. S. 30 (1930). But *cf.* M-G-M Distributing Corp. v. Dewitt Development Corp., 150 Misc. 408, 269 N. Y. Supp. 104 (Sup. Ct. 1931), *aff'd*, 273 N. Y. Supp. 444 (4th Dep't 1934) (arbitration contract valid where third party enforcement not contemplated).

the prohibitions of the typical anti-trust injunction which are usually difficult to enforce, have been converted into working devices for the protection of interests previously victimized by the various abusive practices. Without the inclusion of such a mechanism, efforts at relief short of complete divorcement could hardly have been effective in the face of a necessity of enforcing each violation by arduous and time-consuming contempt proceedings.

It is questionable whether such arbitration could have been imposed upon losing defendants if the Government had won its suit. The Sherman Act gives the courts power to enjoin or otherwise prohibit illegal practices and it might be doubted if this could be extended to allow for organization and operation of arbitration machinery.[91] But the use of the consent mechanism has apparently obviated these difficulties.[92]

Under the decree only the defendants who have consented to the arbitration procedure are obligated to arbitrate all claims brought against them. The right to initiate arbitration proceedings is unilateral and can be invoked only by aggrieved exhibitors; yet no such exhibitor is compelled to arbitrate any dispute which he elects to try directly in a legal proceeding under the anti-trust laws.[93] If the exhibitor decides to arbitrate, however, he will be allowed to do so only if he agrees in advance to accept the award of the tribunal.[94]

Not only have the legal interests of the immediate parties to the arbitration been fully protected, but the rights of all other persons, directly or indirectly affected by any arbitration hear-

A more extensive arbitration development was instituted under the NRA Moving Picture Code, Art. VI (Approved Code No. 124, 1933), but fell apart upon the demise of the NRA after the *Schechter* case. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).

[91] 26 STAT. 209 (1890), 15 U. S. C. § 4 (1934). While "otherwise prohibit" has never been extended to include the organization of intermediate, extra-legal enforcement agencies, however, it is possible that it might be, and the Government's Amended Complaint asks the court to establish an arbitration system "to secure adequate enforcement" of the prohibitions of illegal practices. Amended Complaint p. 80.

[92] Swift & Co. v. United States, 276 U. S. 311 (1928).

[93] Claimants still have the option of ignoring the decree, and suing for triple damages under the general provisions of the anti-trust laws. *The Proposed Consent Decree*, Public Statement of Antitrust Division, U. S. Dep't of Justice, Oct. 29, 1940, p. 8.

[94] Consent Decree § 22(9).

ing, have been similarly secured. They have been granted the absolute privilege of intervening to become a party on agreeing to abide by the arbitrator's decision.[95] Furthermore, the awards, where violations of the decree have been indicated, have been carefully drafted so as not to interfere with existing contract rights of any such outsiders. Both clearance and run awards have been made operative only in respect to subsequent contracts.[96] No private enforcement of any nature is prescribed for violation of the prohibition against licensing pictures to circuit exhibitors for theaters located in more than one exchange district.[97] On the other hand, where run discrimination has been shown, the award, "divorcing" the "guilty" theater from its circuit for purposes of all future contracting, operates directly against the exhibitor recipient of the favoritism without seriously affecting the position of the defendant distributor.[98]

While arbitration, as a general method of enforcement seems highly advantageous in the present situation, a serious problem is raised by the time lags and risk of expense inherent in the organization of the particular arbitration scheme proposed in the decree. It is axiomatic that the possible awards must warrant the risk of loss or exhibitors will not resort to arbitration. The great gains achievable in any successful proceeding, and the improbability of securing sufficient or rapid relief through direct court action, insure against any paucity of clearance or run actions; but the same cannot be said of certain lesser rights "guaranteed" by the decree. It is doubtful whether exhibitors can be expected to risk the burden of costs of arbitration [99] where

[95] Rules of Arbitration and Appeal, § 1; Consent Decree § 22(9).

[96] Consent Decree §§ 8, 10D.

[97] See Consent Decree § 5. It is not clear why defendants violating this provision should not at least be fined as are distributors illegally conditioning a license upon the leasing of pictures for exhibition in theaters outside the exchange district. It may have appeared to the drafters of the decree, however, that as no one private party would be particularly injured by violation of the Section, it would be better to allow such a violation to be penalized by direct contempt action by the Government.

[98] Consent Decree § 10(d).

[99] It has been estimated that the total costs of the preliminary regional arbitration will be $75 as an average maximum, payable by the losing party, or apportioned among the parties by the arbitrator (Rules of Arbitration & Appeal § 10). Average appeal costs, payable by the party taking the appeal unless otherwise apportioned by the Appeal Board (Rules of Arbitration & Appeal § 17), have been estimated at $300. Wall Street Journal, Dec. 2, 1940, p. 3, col. 2.

a distributor has illegally conditioned the licensing of pictures to theaters in one exchange district upon the simultaneous licensing of the pictures for theaters located in other exchange districts, since the distributor, if found guilty, must merely pay a nominal sum into the general arbitration fund, and the complaining exhibitor receives no direct relief.[100] Similarly, the "right" to cancel short subjects, offensive pictures, or additional blocks of features forced on the exhibitor as a condition to the lease of other desired features, is of doubtful value if the primary arbitration may extend well over a month before any opinion is announced.[101] As no exhibitor can be expected to wait for a month prior to discovering what pictures he has available for playing, it would seem advisable to amend the arbitration rules to provide for expedited hearings of such "forcing" cases. In other instances the award may have to be made more appealing to the exhibitors; or the Government be given power to invoke the arbitration machinery.

While the arbitration machinery and rules are still in only skeleton form, and will have to be amended and expanded from time to time according to the provisions of Section 22(6), the most important technical problem remaining to be clarified is the ultimate enforcement of final arbitration awards.[102] Presumably such enforcement would be through application to the court for a citation of contempt against the non-conforming party.[103] But whether such an application against a consenting defendant must be brought by the Government as one of the

[100] Consent Decree § 5. This also is true of arbitration proceedings undertaken prior to entering into a license, where a claim of violation of the restrictions against selling in blocks of more than five pictures or of forcing "shorts" or "foreigns." Consent Decree § 4(b).

[101] Under the provisions of Rules 3 and 5 it is impossible to start a hearing on a claim in less than 21 days, and a dilatory defendant may extend this time by at least six days by failing to agree in advance to the appointment of agreed-upon arbitrators. Then, regardless of any possible prolonged hearing, the arbitrator is given 30 days in which to make his final decision. Rules of Arbitration & Appeal §§ 3, 5, 10.

[102] The court has retained jurisdiction necessary for "construction" of the decree. Consent Decree § 23(a). There is thus a danger that the entire arbitration machinery may be side-stepped, through constant resort to the court to secure constructions of the decree which presumably would be binding upon the arbitrators, and overrule any contrary holding.

[103] Consent Decree § 23(a).

parties to the decree, or by the exhibitor who made the original complaint, is yet to be decided.

Although the Government has delegated the primary enforcement of the terms of the decree to complaining exhibitors, and postponed for the time being any further action leading towards divorcement,[104] it has not dissociated itself entirely from the operation of the decree or the control of restraints in the industry. Instead, a permanent sub-division has been organized in the Antitrust Division to supervise the workings of the decree and determine the necessity for future Government action.[105] This group is aided by requirements in the decree that written notice be sent to the Division of all changes in theater ownership or control by the consenting defendants,[106] and by permission granted the Government to examine on demand the books and documents of the defendants relevant to the decree, including complete data on trade showings, licenses contracted, and records of all arbitration awards entered against the distributors and the steps taken to comply with them.[107] Furthermore, the proceedings before the various arbitration boards will give the Government access to valuable information as to the situs of actual instances of restraint should the Division decide to inaugurate future suits. Thus a not inconsequential result of the decree will be the supplying of the Government with information about the mysteries of the industry otherwise rarely available. The knowledge of this by the defendants may itself exercise a prophylactic effect upon future abuse of power.

The three defendants which did not consent to the decree are now somewhat ambiguously situated, as they prepare to defend against the continuing Government suit.[108] Owning no theaters, the threat of divorcement means little to them should the Government win its case, and they therefore stand to lose much less than did the consenting defendants. They might even improve their competitive position if the larger producer-distributor organizations were deprived of their remunerative exhibition

[104] Consent Decree § 21.

[105] MOTION PICTURE HERALD, Nov. 2, 1940, 13, col. 1.

[106] Consent Decree § 11.

[107] Consent Decree § 18. All information secured is to be confidential with the Department of Justice.

[108] Efforts to have the suit quashed as to the remaining defendants have been overruled, and the case is expected to go to trial sometime in the spring of 1941. VARIETY, Jan. 8, 1941, 5, col. 5.

facilities. On the other hand, block booking is of great importance to both Universal and Columbia.[109] Both of these companies could ill afford the added expense of several new selling "seasons"; both might have to engage in extensive unprofitable financing to secure the additional working capital necessary if they were to accumulate five completed pictures prior to contracting for their exhibition.[110] All three companies stand to gain sizable profits by operating on an annual contract basis, in the form of increased licensing by unaffiliated exhibitors desirous of securing an assured back-log of product and thus placing themselves in a better position to bargain for the various small blocks offered by the consenting producers. Consequently, it is understandable why the three unaffiliated defendants should have determined to remain aloof from the decree.

The Government, however, is not only faced with the dilemma of proceeding against the intransigent defendants or confessing the weakness of its original case, but has expressly obligated itself in the decree to secure selling restrictions on block booking and blind selling equivalent to those imposed upon the consenting parties.[111] This may be difficult for the Government to achieve, for the remaining defendants appear to be in a good strategic position to meet any subsequent Government attack. They are unaffected by the integration problem and control too small a percentage of the business of the industry to substantiate any charge of monopoly. The amended complaint, however, charges defendants with conspiring with the large circuits to discriminate against the small independent exhibitors,[112] and each separate defendant is charged with illegally restraining trade by entering into contracts imposing compulsory block booking and blind selling upon exhibitors.[113] It is possible that the Government may secure the necessary evidence to show collusion between the defendants and the more powerful chains, and it is not inconceivable that the prosecution can persuade the Court

[109] United Artists has rarely, if ever, utilized block booking, although they have at times pre-sold all of the pictures to be made by any one of their component producers. Amended Complaint, p. 40, ¶ 107.

[110] See note 43 *supra*.

[111] Consent Decree § 12(a), (b).

[112] Amended Complaint, p. 77, ¶ 178. This would seem to be in line with the definition of an illegal conspiracy found in Interstate Circuit v. United States, 306 U. S. 208 (1939).

[113] Amended Complaint, p. 78, ¶¶ 180-183.

to overrule *Federal Trade Commission v. Paramount Pictures,*[114] and declare block booking and blind selling illegal *per se.*

Even should the Government be successful in its subsequent trial of the "little three," it is of course not certain that it could induce the court to grant more than an injunction against the illegal practices.[115] Should their right to block booking be finally denied, however, the defendants might well agree to accept arbitration. Certainly blocks of five pictures with arbitration would seem preferable to retail licensing by individual features.

CONCLUSION

The decree which has been approved is the product of negotiation and compromise by contesting parties, and therefore can hardly be expected to achieve a legislative standard of perfection. It is broad in scope and highly experimental in certain of its details so that evaluation of its merits can at best be only enlightened guesswork. Yet while the merits or evils of the various provisions must eventually prove themselves through experience in practice, a few generalizations may be made from this vantage point.

It would be unfortunate to judge the success or failure of the decree as a unit, for the decree has been aimed at more than one channel of restraint. Moreover, in the establishment of the grievance machinery of disinterested arbitration, the decree has achieved a technical advance in anti-trust enforcement which may prove of greater value than any of the provisions more particularly related to motion pictures. The provisions against clearance, run, and other forms of discrimination are weak only in those instances where they do not go far enough, and in the oversimplification in denoting circuit buying power as the sole cause of favoritism. The selling practices imposed by the decree, however, are of more questionable merit. Surely the possibility of abuse exists in the workings of the former practices, but whether the artificial compromise developed as a curative will

[114] 57 F. (2d) 152 (C. C. A. 2d, 1932). This might be overruled under the Sherman Act as a combination or conspiracy in restraint of trade between the corporation and the individual persons comprising its officers and directors, or as an illegal tying contract prohibited by § 3 of the Clayton Act. 38 STAT. 731 (1914), 15 U. S. C. § 14 (1934).

[115] See note 91 *supra.*

relieve or only aggravate the evils inherent in the distribution system can be known only after the new procedures have had a fair trial. It may be that the "blocks of five" and "trade showing" will have to be abandoned, and new procedures devised in the light of future experience.

FIRST QUARTERLY REPORT OF THE MOTION PICTURE ARBITRATION TRIBUNALS

PAUL F. WARBURG *

ON February 1, Motion Picture Arbitration Tribunals in thirty-one leading cities of the United States opened their doors for the arbitration of disputes between exhibitors and distributors, in accordance with the provisions of the Consent Decree, signed by Judge Goddard of the United States District Court, on November 20, 1940. Thus, in little more than two months, the Administrator named in the Decree, the American Arbitration Association, had leased offices in thirty-one cities, engaged and trained personnel, prepared new forms, purchased furniture and equipment, and opened the Tribunals on the date scheduled.

Exhibitors, distributors' representatives, officials of trade associations, and the motion picture press, immediately called at the offices of the Tribunal, to see what facilities were available, ask questions as to procedure, and receive copies of the forms to be used in the filing of cases.

It was not until Friday of the first week, February 7, that the first actual complaint was filed for arbitration and, fittingly enough, it was filed in the capital city, Washington, D. C. An exhibitor in Baltimore had the distinction of filing the first case. He claimed that the clearance under which his theatre was operated was unreasonable. Clearance is the amount of time that, pursuant to contract, must elapse between the first and each subsequent showing of the same picture. Three of the distributors, parties to the Decree, were named in the exhibitor's complaint, and in addition he named three other Baltimore theatres as being interested in, and probably affected by, any award that might be made in the proceeding.

* Chairman, Administrative Committee of the Motion Picture Arbitration System of the American Arbitration Assn. This Report was prepared from material compiled for the Committee by J. Noble Braden, Executive Director of the Motion Picture Arbitration Tribunals.

In the following week, two additional cases were filed: one in Washington, involving the same type of complaint; and the other in Boston under Section VI of the Decree, involving a complaint that the distributors had refused to give the exhibitor any pictures for exhibition in his theatre in Nashua, New Hampshire. Additional cases were filed from week to week, and at the close of the first quarter, April 30, 1941, a total of 56 cases had been filed. The territorial distribution of these cases is as follows:

Albany	2	Milwaukee	2
Boston	4	Minneapolis	3
Buffalo	4	New Haven	1
Chicago	2	New Orleans	3
Cincinnati	1	New York	10
Cleveland	1	Oklahoma City	1
Dallas	3	Philadelphia	4
Denver	2	Pittsburgh	3
Detroit	2	Portland	1
Los Angeles	3	St. Louis	1
		Washington, D. C.	3

Of the 56 cases filed, 34 involved the question of clearance under Section VIII of the Decree, and 13 involved a run of pictures, under Section VI of the Decree. The latter section provides that if an exhibitor has been refused pictures by a distributor, he may appeal to arbitration and, upon proof satisfactory to the arbitrator, may secure an award directing the distributor to sell him some run of pictures upon terms and conditions fixed by the distributor.

Two cases were filed under Section X of the Decree, which will not become operative until August 31, 1941, under the provisions of Section XX of the Decree. These cases involved the refusal to license a specific run. The balance of the cases filed—seven in number—include more than one complaint, and hence involve more than one Section of the Consent Decree. Six of the seven, however, included clearance in addition to other complaints.

Under the arbitration rules, fifteen to seventeen days must elapse after the filing of a Demand before the clerk of a Tribunal submits to the parties a list of arbitrators from which it is expected the arbitrator will be selected to hear and determine the dispute. Seven days are allowed the parties to return the list and indicate which arbitrators are acceptable. The arbitrator is appointed following the return of the list, and he and the parties are then consulted as to their mutual selection of a date

of hearing. Five days' notice of such hearing must be given under the rules. Thus, a minimum of twenty-seven days must elapse from the filing of a Demand before a hearing can be held in the case.

To the Boston Tribunal went the distinction of having the first hearing. On March 14, Professor Arthur L. Brown, of Boston University, took his oath of office and called to order the first hearing under the Motion Picture Rules of Arbitration and Appeals—just twenty-seven days from the date of filing the Demand for Arbitration.

This first case brought about much comment in the trade press, where it was said that the previous owner of the theatre had been trying for several years to secure pictures for exhibition, and had brought suit under the Sherman Act to prove a conspiracy depriving him of such pictures. Before the hearing took place, the exhibitor withdrew his claim against one of the distributors, as a satisfactory contract had been concluded, giving him its pictures. At the hearing, after the opening statement of counsel for the exhibitor was received by the arbitrator, the attorneys representing the other four distributors filed a written consent to the entry of an award, directing their companies to give some run of pictures to the complaining exhibitor. In the comments of the trade press—the exhibitor had accomplished in ten minutes what his predecessor had been unable to accomplish in more than two years.

After the first hearing in Washington, which consumed five days, several suggestions were made by the arbitrator and the clerk of the Washington Tribunal, in regard to reducing the time required for the reception of evidence in subsequent clearance cases. As a result, a conference was arranged with the attorneys for the complaining exhibitor, intervening exhibitor and the three distributors named in the next complaint, and participated in by representatives of the Association, which resulted in an agreement to prepare certain documentary proof and submit this proof in the form of stipulations at the hearing. This saved the time, not only of the arbitrators and the parties, but of the several witnesses who would have been called upon to bring such documents from their offices and remain at the hearing while the data sought was obtained from them by testimony and cross-examination.

As this second hearing consumed only three days, it is believed two days were saved by the stipulation method. Further experi-

ments will be conducted from time to time, and perhaps some method may be established which will materially reduce the time needed to procure the evidence necessary in establishing the facts required in considering clearance disputes.

During the three months' period, eighteen of the cases filed were completed by awards or settlements. Seven awards were rendered by arbitrators, one of which has been appealed. Eleven cases were settled, and discontinued by consent of the parties.

A summary of the awards rendered appears at the end of this report.

It will be of interest to review the settled cases and learn what had been accomplished by the filing of the Demand for Arbitration which would cause the claimants to withdraw their complaints.

Full information as to the agreements made between the exhibitors and distributors in settling and discontinuing these cases is not available, but from the information on file in the Tribunal offices, it is known that in six cases involving claims for some run of pictures, arrangements were made between the complaining exhibitor and the defending distributor for a contract for pictures acceptable to the exhibitor.

In the other four cases, the complaint involved clearance, and by the withdrawal of the complaint, it is evident that some satisfactory arrangement must have been effected between the exhibitor and distributor regarding the readjustment of the clearance complained of. Thus, the exhibitors, by filing Demands for Arbitration, secured some favorable change in their contractual relationship with the distributors.

When the terms of the Consent Decree and the Rules of Arbitration and Appeals were announced, various estimates of the cost of an arbitration proceeding appeared in the trade press. With only seven awards completed, one of which has been appealed, it would appear premature to give any figures concerning the costs of arbitration; but in view of the considerable speculation on this particular phase of arbitration, a recital of the costs in these seven cases will be of interest, although any average obtained from such figures may have to be altered in the future.

In the first case heard in any tribunal, that heard in Boston and set forth at some length above, the total cost to the five parties—the exhibitor and four distributor defendants, amounted to $10.00 for the arbitrator's honorarium and $7.50 for the at-

tendance of a stenographer, plus the $10.00 filing fee paid by the exhibitor, or a total of $27.50. Under the arbitrator's award, his fee was divided among the five parties and by agreement between the exhibitor and distributors, the cost of the attendance of the stenographer was divided in half. Therefore, the total cost to the exhibitor in securing some run of pictures from all five distributors was $15.75. In addition, of course, he had to meet whatever charge his attorney made for representing him in the proceeding.

In the first case in Washington, which concerned a clearance dispute and in which appeared the complaining exhibitor, two distributors defendants, and an intervenor representing three theatres in Baltimore, the hearings required five days, and the total cost amounted to $175.00; $20.00 of this represents filing fees, $50.00 for the attendance of the arbitrator on five days, and $105 for the attendance of the stenographer. The extent of the arbitrator's day in this case is worthy of special note. To accommodate the parties and counsel, the arbitrator—E. B. Prettyman, Vice President of the Washington, D. C., Bar Association—conducted one hearing which lasted from noon until after midnight, and on other days, sat from ten in the morning until six in the evening. By the award of Mr. Prettyman and the agreement of the parties regarding stenographic expense, the costs in this case were also divided and the cost to the complaining exhibitor was $48.75.

A tabulation of the costs incurred by the complaining exhibitor in each of the seven cases concluded in this quarter, is as follows:

Case	Filing and arbitrator's fees	Stenographic cost
1	....	$10.00
2	$20.00	63.76
3	30.00	....
4	22.50	26.25
5	20.00	5.00
6	12.00	3.75
7	60.00	....
	$164.50	$108.76

The average cost per case for filing fee and arbitrator was $23.50; for stenographic expense, $15.54. Incidentally, the largest stenographic item appearing above, $63.76, was incurred in the case now on appeal, and included the cost of furnishing the three transcripts for use in the prosecution of the appeal.

As suggested above, it is inadvisable to try to ascertain the average cost of arbitration based upon these seven awards, but in any event, the figures presented show the actual and average cost of the seven cases completed to date.

In the administration of the Tribunals, members of the Central Office staff made inspections of the various tribunals, and in every instance, a member of the Central Office staff was present during the hearing in each Tribunal.

A reporting system has been installed so that duplicate copies of each paper filed in every case is immediately sent to the Central Office, and thus the uniformity of the proceedings throughout the country is insured by this Central Office check-up and supervision.

During this three months' period, the Association proceeded with the completion of the Arbitration Panels in each of the thirty-one cities. Several thousands of nominations were received and considered by the Administrative Committee. Under the provisions of the Decree, no one may be appointed an arbitrator who has any financial interest in, or has or has had any connection with, the production, distribution or exhibition of motion pictures, or has or has had any interest in any motion picture theatre, as landlord, lessor or otherwise. Under this provision, it was necessary for the Administrative Committee to reject well over 50 per cent of those nominated for membership on the Motion Picture Panel.

With the close of the quarter, the number of arbitrators qualified and appointed in the Motion Picture Panels of the thirty-one cities was 1017.

It is interesting to note that the majority of the arbitrators appointed are members of the bar. In practically every city, presidents, ex-presidents and officials of Bar Associations are numbered among the members of the Panel. In addition, the arbitrators include educators in almost every city, as well as men distinguished in business and other professions.

The arbitrators who served in the hearings held in the first quarter, in addition to the two mentioned above, were: George D. Begole, former Mayor of Denver, Dan B. Cull of Cleveland, former Common Pleas Court Judge; Robert J. Callaghan, Philadelphia, attorney; John A. Daly, Boston, attorney and officer of the Suffolk County Bar Association; Sefton Darr, Washing-

ton, D. C., attorney and former President of the Washington, D. C., Bar Association; Morton J. Hall, Albany, special agent of the Massachusetts Mutual Life Insurance Company; Charles Z. Henkle, Chicago, Vice President of the Continental Illinois National Bank; Phillip E. James, New Orleans, attorney; Arnold A. Karlins, Minneapolis, attorney; Philip J. Mackey, Minneapolis, attorney; Charles P. Megan, Chicago, ex-President, Chicago Bar Association; Weldon D. Smith, Buffalo, official of a large department store; George A. Spiegelberg, New York, attorney; Thomas I. Whelan, Milwaukee, Professor of English and Law, Marquette University.

A manual, describing the powers, duties and responsibilities of arbitrators in the Tribunals of the Association, was prepared and published and a copy sent to each member of the Motion Picture Panels during the quarter. The manual occasioned considerable comment from the press and was printed, in whole or in part, in practically all of the motion picture trade publications.

At the beginning of the quarter, Judge Goddard announced the completion of the Appeal Board. The Honorable Van Vechten Veeder, former Judge of the Federal Court had been appointed Chairman of the Board at about the time of the signing of the Decree. On February third, Judge Goddard designated George W. Alger, prominent New York attorney and former impartial arbitrator in the Women's Clothing Industry, and Albert William Putnam, also a prominent member of the New York Bar, and a member of the law firm of Winthrop, Stimpson, Putnam and Roberts, as the other two members of the Board of Appeals.

It has been most gratifying to the Administrator to note the comments in the trade press regarding the Panels of Arbitrators and the conduct of the hearings, as well as to receive the personal expressions of appreciation from exhibitors' and distributors' attorneys and representatives during the course of the past three months. The press has been enthusiastic in its comment regarding hearings in the various sections of the country and the conduct of the proceedings by the Motion Picture Panel. An editorial appearing in one of the motion picture papers appears elsewhere in this issue, and only the limitations of space prevent quotations from other periodicals. The Association has received most cordial cooperation from the motion picture press, and a real service has been rendered not only to the motion picture

industry, but to the arbitration movement generally by the splendid reporting and editorial comment appearing in such papers.

A summary of the decisions rendered during this first quarter is printed below in answer to many requests that a summary of decisions be printed, and thus made available to the many parties and attorneys interested in the arbitration of disputes under the Consent Decree.

SUMMARY OF AWARDS

Philadelphia. Florence Theatre and Twentieth Century-Fox, et al. (*11-1F-41*).

The 14-day clearance between Fox Theatre, Burlington, and the Florence Theatre, Florence, is reasonable and the claim of the Florence Theatre against Twentieth Century-Fox, *et al.*, and Atlantic Theatres, Inc. (Intervenor) is, therefore, disallowed.

Expenses of the arbitration to be paid by the complainant, Florence Theatre, Florence, N.J.

New Orleans. Modern Theatres, Inc., and Paramount Film Dist. Corp. (*27-1D-41*).

The Arbitrator in his award found that the defendant distributor had offered pictures to the complaining exhibitor, but had refused to limit the contract of pictures to blocks of five.

The distributor respondent has not refused to license its features for exhibition in exhibitor's theatre contrary to the provisions of Article VI of the Consent Decree.

Complaint dismissed at complainant's expense.

The Consent Decree in Section VI does provide for a maximum of five pictures in a single group to be offered by the distributors but the application of this Section is specifically limited by Section XX of the Decree to releases after August 31, 1941.

Washington. Walbrook Amusement Co. and Twentieth Century-Fox, et al. (*14-1F-41*).

1. The clearance granted the Ambassador Theatre by the respondent distributors, of 7 days over the Walbrook Theatre, is reasonable.

2. The clearance now granted the Forest Theatre by the respondent distributors of 7 days over the Walbrook Theatre is unreasonable.

3. The clearance granted the Gwynn Theatre by the respondent distributors of 7 days over the Walbrook Theatre is unreasonable.

4. The maximum clearance of the Forest and Gwynn Theatres over the Walbrook shall be ahead of the Walbrook, which award means that the Walbrook may play a picture immediately after the conclusion of the run of the picture at the Forest or the Gwynn, at whichever theatre the picture may run.

Cost of the proceedings divided into four parts, and one part assessed against the complainant, the intervenor, and each of the two respondents, respectively.

Chicago. E. F. VanDerveer, State Theatre and Loew's Inc. (*5-1D-41*).

The arbitrator in his award found that Loew's, Inc., had offered the complainant 10 pictures of its 1939-40 product which was not, in his opinion, a proper offer under Section VI of the Consent Decree.

Loew's, Inc., is hereby directed to offer its product for license to E. F. VanDerveer for exhibition in the State Theatre on a run to be designated by Loew's, Inc., and upon terms and conditions fixed by Loew's Inc., which are not calculated to defeat the purpose of Section VI of the Consent Decree.

Loew's, Inc., is directed to pay the costs of this proceeding.

Chicago. Ken Theatre Corporation and Paramount Pictures, Inc., et al. (*5-2F-41*).

The complaint is dismissed for want of jurisdiction under Sect. VIII of the Consent Decree.

Ken Theatre Corporation is directed to pay the costs of this proceeding.

Boston. Paulstan, Inc., and Paramount Film Dist. Corp., et al. (*3-D-41*).

Respondent distributors directed to offer their pictures for license to Paulstan, Inc., up to July 31, 1942, on a run to be designated and upon terms and conditions which are not calculated to defeat the purpose of Section VI of the Decree.

Cost of Arbitrator's fees to be divided equally among parties.

Denver. Jos. J. Goodstein Enterprises, Inc. and Twentieth Century-Fox. (*22-1D-41*).

At the opening of the hearing on the fifth day, the attorney for the complainant requested permission to dismiss the complaint of his client against the respondent and all other parties named in the complaint.

The arbitrator dismissed the complaint and ruled that the complainant reimburse the respondent for the Arbitrator's fees paid by him.

NOTES

The Arbitration System is Examined. Under the foregoing title there appeared in the April 16, 1941, issue of *The Exhibitor* an editorial by Jay Emanuel, publisher. Because it represents the viewpoint of that section of the motion picture industry for whose benefit the Consent Decree was entered into, the JOURNAL takes pleasure in reproducing it herewith:

> The first two months have shown nothing to indicate that the system of arbitration inaugurated under the consent decree hasn't every chance

of proving successful. Examination of the progress during the 60-day period should give much satisfaction to those who have been arguing for a permanent arbitration body for the industry.

The most noteworthy feature of the survey is that there have not been more cases filed, but this might be attributed to the fact that most exhibitors still want to watch the progress of other cases. It is interesting to note, also, that many of the cases have not been filed by exhibitors whose complaints were wide and loud before the consent decree. Many have come from the hitherto unheard-from exhibitors who must conscientiously believe that the arbitration system will benefit them.

It is also interesting to note that the coming of arbitration has not prevented exhibitors from filing anti-trust suits in the courts to secure their remedies. But the number of these actions has dropped off at an impressive rate.

Observers figured, before the arbitration system began, that the most troublesome cases would concern clearances. They were correct in their forecasts. Examination of the records indicates that where the hearings have run past the expected time, they have been tied up in wranglings over clearance. Cases where "some run" has been asked have been settled before hearing, in many instances.

Another interesting angle has developed in that not many cases have been filed against circuit houses. It had been thought that affiliated theatres would be targets in many arbitration disputes, and although some have been, more were expected.

In short, we believe the sponsors of the arbitration system should be cheered by the progress made. The arbitrators, on the whole, have helped the system no end by contributing a practical, informal note, making members of the industry feel at home. The sole incident in New Orleans where the arbitrator barred the trade press won't happen again, we have been assured.

In conclusion, by the time the new type of selling begins, the arbitration system will be functioning smoothly, and, we believe, of definite advantage to the industry. The attention of the entire business, then, will be directed at the dollars-and-sense part of the decree.

REVIEW OF ARBITRATION AFFAIRS

COMMERCIAL ARBITRATION

Trade Association Executives to Survey Arbitration Facilities. Twenty-five executives of leading national and local trade associations joined in a conference on April 9 with the American Arbitration Association and pledged their cooperation in assisting Government agencies to prevent disputes from interfering with the national defense program.

The immediate program undertaken by the Trade Association Executives will be a survey to be made by means of a questionnaire to ascertain what facilities for settling disputes are now maintained by trade associations, and the extent of their use by members; and second, what companies engaged in national defense production or awarded government contracts are not protecting deliveries of their products by the use of arbitration clauses.

Charles R. Cosby, President of the Trade Association Executives of New York, was appointed chairman of a committee which will lay the groundwork for the survey and map out the areas which are unprotected by arbitration.

Herman G. Brock, Vice President of Guaranty Trust Company, presided over the conference, which was attended by executives of the following organizations: American Arbitration Association, American Boiler Manufacturers Association, American Fur Merchants Association, American Standards Association, American Transit Association, Amusement Board of Trade of New Jersey, Inc., Automobile Merchants Association of New York, Bookbinders Association and Printers and Publishers, Cotton Thread Institute, Eastern Lithographers Association, Fur Dressers & Fur Dyers Association, Inc., General Arbitration Council of the Textile Industry, Glass and other industries, Institute of Bank Stationers, Institute of Carpet Manufacturers, Label Manufacturers National Association, Motion Picture Producers and Distributors of America, National Knitted Outerwear Manufacturers Association, National Slate Association, New York District Paper Box Association and Packaging Machinery Manufacturers.

American Arbitration Association Highlights for March. 24 new commercial cases were received during the month, in which claims ranged from $307 to $40,000 and in which controversies included: stock transaction, refusals to accept deliveries, fee due a consulting engineer, defective construction, balance due for extra work in building operation, royalties, quality of cheese. In one unusual case the arbitrators were called upon to determine whether a number of expensive suits of clothing delivered by a well-known tailor properly fit the customer, with the latter modeling the suits. . . . . A special annual report made to Actors Equity Association shows that of the 19 disputes between actors and managers during the year ending March 31, eight were disposed of by awards, nine were settled after submission, with one pending. . . . . The fluctuating condition of the yarn market was given by two firms as their reason for desiring an immediate hearing of their dispute. Within three hours of its submission arrangements were completed and an arbitration was had the same afternoon. . . . . The Van Owners' Association of New Jersey entered into an arrangement with the American Arbitration Association, under which all disputes with customers will be arbitrated. . . . . Thirty trade associations made nominations for membership on the National Panel of Arbitrators, as part of the Association's extension of National Defense facilities, 56 new arbitrators having been added to the Panel in March. . . . . Self-regulation by the Flat Work Association of Greater New York was successfully demonstrated when differences between eight members, arising out of the group's Fair Trade Practices Agreement, were submitted to arbitration. . . . . A new manual—*The American Arbitrator*—describing the duties and responsibilities of the office of arbitrator, was distributed. . . . . J. Noble Braden, Executive Secretary of the Association, gave a second lecture at the Wharton School of Finance and Accounting, University of Pennsylvania, and conducted a sample arbitration for the students. . . . . Arbitration literature was distributed to the reference departments of 52 branches of the New York Public Library, under the direction of the Chief of Circulation. . . . . An important decision of the Minnesota Supreme Court held that arbitration clauses covering future disputes are no longer considered as against public policy (see Mr. Julius Henry Cohen's article in this issue). . . . . An amendment to the Michigan Arbitration

Law, which would make arbitration clauses valid and enforceable, was introduced in the Michigan Legislature. . . . . Appraisals and evaluations were brought under the provisions of the New York Arbitration Law by a Bill signed by Governor Lehman on March 24, 1941 (see p. 237).

Award for Distinguished Service to Arbitration in Foreign Trade. The publishers of the *Importers Guide* have created an annual award, to be known as The Importers Guide Award for The Advance of Arbitration in Foreign Trade, which will be signified by a silver plaque to be given to that business firm, corporation or association in the United States which shall have made the outstanding contribution to arbitration in foreign trade. The distinguished service for which the award will be made may be either for the installation of or use of arbitration in the foreign trade relations of an individual organization; or for the promotion of the use of arbitration in foreign trade through research, education, advancement of its principles, or other concrete action in this sphere. The purpose of the award is to stimulate the use of arbitration in international commerce and thus benefit the foreign trade of the United States.

The award will be made under the auspices of the American Arbitration Association, at a date jointly selected by the donor and the sponsor, and the recipient will be chosen by a jury to be named by a Committee on Arrangements consisting of Shane O'Neill, representing *Importers Guide;* Benjamin H. Namm, representing the Association, and Peter Grimm, chosen by the first two named.

Improved Facilities Result in Fewer Arbitrations. A somewhat paradoxical situation, in which experience has proved that the perfection of rules and arbitration procedure results in a constantly decreasing number of matters submitted, is reported by the National Cottonseed Products Association. In the early years of the operation of this Association's arbitration machinery it was not unusual to have arbitration proceedings in more than a hundred cases annually. Now the Association frequently goes through a year without having a single arbitration.

This record is attributed by the Association to a number of causes: 1) A thorough understanding of the trade practice rules by the members; 2) The annual revision of the rules to meet

changing conditions; 3) The preliminary steps of a proceeding, consisting of the exchange of complaints and answering briefs, which give each party a clearer idea of the viewpoint of the other side and frequently lead to a settlement.

Where a matter finally goes to arbitration before one of the arbitration committees of the Association, each side deposits $50 with the Association. After the proceeding the deposit of the prevailing party is returned and all charges are assessed against the loser.

There are, unfortunately, no means of measuring the actual or potential savings to an industry through this method of settling disputes. There are annually traded in, in the Cottonseed Products industry, billions of pounds of cottonseed oil, millions of tons of cottonseed hulls, cottonseed cake and meal, and a million or more bales of linters, the average value of which aggregates from one hundred to two hundred million dollars, all of which is protected from litigation.

Press Assists in Mobilizing Arbitration. The mobilization of voluntary arbitration has received gratifying assistance from the press and periodicals in recent months.

During the week ending April 19, 1941, the motion picture trade press devoted 57 columns of news to developments in the Motion Picture Arbitration Tribunals.

Among recent articles on arbitration are the following: MODERN INDUSTRY (February), *Should Compulsory Arbitration of Labor Disputes Be Instituted in the Defense Industries?;* PERSONNEL (February), *Arbitration of Labor Disputes;* ROCKEFELLER CENTER MAGAZINE (February), *Industry's Peacemakers;* READER'S DIGEST (April), *Smoothing Pan American Tradeways;* ROTARIAN (April), *Lubricating Trade in the Americas;* BOSTON BUSINESS (April), *Movies Agree to Arbitrate;* FUTURE (April), *Arbitrating Business Bottlenecks;* THE EXHIBITOR (April 16), *The Arbitration System is Examined;* WORLD CONVENTION DATES (May), *Mobilizing Arbitration;* ASSOCIATED PRESS FEATURE SERVICE, *AAA Helps Defense Program.*

Primer on Arbitration. The General Federation of Women's Clubs has recently issued "A Primer on Arbitration," prepared by Mrs. Arthur D. Jaques, the purpose of which is to "promote

Arbitration-Consciousness in our people so that they will instinctively turn to arbitration and demand its use for the settlement of all controversies, be they of a personal, commercial, industrial, or of an international nature."

The answer of the Federation to the question "Why stress the study of arbitration when we are in the midst of a world conflict?" is that even in a time of such terrific upheaval as we are witnessing today, we must consider not only immediate problems, but long-term objectives, if we are to be prepared for the peace that must eventually come when the present struggle is over. If the world is ever to have enduring peace, states an introduction to the Primer, it will come through an understanding of and an application of the principles of arbitration and similar methods of adjusting differences among nations.

INDUSTRIAL ARBITRATION

National Defense Mediation Board. On March 19, President Roosevelt ended weeks of speculation concerning a government agency to mediate disputes arising in national defense projects by announcing the creation of a National Defense Mediation Board and its personnel. The purpose of the Board is "to assure that all work necessary for national defense shall proceed without interruption and with all possible speed," and its jurisdiction will begin when the Secretary of Labor certifies to it that the U. S. Conciliation Service is unable to adjust a dispute. Matters coming under the jurisdiction of the Railway Mediation Board are excluded from those which may be referred to the new Board.

The National Defense Mediation Board is composed of eleven members—three representing the public, four representing employers and an equal number representing employees. The personnel of the Board follows:

Public—Clarence A. Dykstra, Director of Selective Service (Chairman); William H. Davis, former chairman of the N. Y. State Mediation Board, and Dr. Frank P. Graham, President of the University of North Carolina.

Employees—George Meany, Secretary-Treasurer, American Federation of Labor; George M. Harrison, Grand President, Brotherhood of Railway and Steamship Clerks; Philip Murray,

President, Congress of Industrial Organizations, and Thomas Kennedy, Secretary-Treasurer, United Mine Workers of America.

Employers—Walter C. Teagle, Chairman, Standard Oil Company of New Jersey; Roger D. Lapham, President, Hawaiian-American Steamship Company; Eugene Meyer, Publisher of the Washington Post, and Cyrus S. Ching, Vice-President, United States Rubber Company.

Major defense strikes facing solution by the Board, or otherwise, were those in the following important production plants: Allis-Chalmers Mfg. Company, Milwaukee; Bethlehem Steel Company, Bethlehem, Pa.; Cornell-Dubilier Corp., South Plainfield, N. J.; Federal Motor Truck Co., Detroit; Stanley G. Flagg Co., Stowe, Pa.; International Harvester Co., Chicago; Midland Steel Products Co., Detroit; Moore Drydock, Oakland, Calif.; Ray Day Piston Co., Detroit; Snoqualmie Falls Timber Co., Snoqualmie, Wash.; Standard Tool Co., Cleveland; Universal Cyclops Steel Corp., Bridgeville, Pa., and Vanadium Corp. of America, Bridgeville.

Boards of Inquiry for New York State. Spurred by the troublesome New York City bus strike, then in progress, the New York Legislature passed in quick time a bill introduced by Assemblyman Ives, Chairman of the Committee on Industrial and Labor Conditions, which authorizes the State Industrial Commissioner to set up boards of inquiry in labor disputes involving the public interest. A description of the provisions of the Bill will be found in the Arbitration Law Section.*

Governor Lehman Acts to Bar Discrimination in Defense Employment. On March 29, Governor Lehman announced the establishment of a special committee composed of 27 prominent citizens of New York State to work with the State Defense Council to consider ways and means of ending discrimination in employment for defense industries. In his letter to those invited to serve on the Committee, Governor Lehman said:

> ". . . I continue to get evidence of the difficulties still being encountered by various minority groups in their efforts to find employment and to make available to industry and the country's defense effort their skills and interest and active support.

* See p. 237.

"At a time when the need for extending industrial activity is calling forth the utmost effort of both public and private organizations, it is unpardonable defeatism for us not to find a way to use the labor resources which these minority groups represent. Experience clearly indicates the loss of productive resources which such a course entails.

"It is at least an equally serious challenge to the sincerity of our desire to defend and strengthen our democratic way of life when trained, experienced, willing workers who need jobs and who know of the need for workers are refused an opportunity on grounds which are obviously un-American."

Thirty-Day Delay on Defense Industry Strikes in Michigan. By invoking the "public interest" clause of the state labor mediation laws, adopted by the Legislature in 1937, the Michigan Labor Board has ruled that thirty days' notice must be given the Board, instead of the previous five-day notice required in general manufacturing plants, before strikes can be called in plants producing national defense materials. The waiting period is designed to give the Board an opportunity to mediate labor disputes which may arise in Michigan factories which are estimated to have more than one billion dollars in orders for armament needs. If the ruling withstands the court tests which it is believed labor leaders will subject it to, it is assumed that it will include factories which have the role of sub-contractors to those fabricating tanks, machine guns, military trucks, etc., thus affecting hundreds of plants which do not hold direct government contracts.

A Deluge of Legislation. The JOURNAL has received from the Merchants and Manufacturers Association of Los Angeles a digest of nearly 300 bills dealing with relations between employers and employees, all introduced during the first half of the current session of the California Legislature, which that body will be asked to consider. The situation in California would seem to be typical of that existing throughout the country where much attention is being given to labor legislation, particularly to methods of controlling or dealing with disputes and strikes.

One of the 300 bills provides for the setting up of a State Labor Relations Commission; another would amend the Labor Code to establish a division of mediation, conciliation and arbitration with authority to require arbitration; a third would amend the Constitution to establish a court of conciliation and arbitration to which disputes would be submitted upon failure

of conciliation, with authority given to the court to make binding awards and to fine employees who strike in violation of awards.

U. S. Mediators 95 Per Cent Effective. John R. Steelman, Chief of the Conciliation Service of the U. S. Department of Labor and whose article on Conciliation and National Defense appears in this issue,* stated on February 25, that his Department had successfully adjusted, without stoppage of work, 95 per cent of the threatened strikes referred to it. The ever-increasing co-operation from both labor and industry is credited by Dr. Steelman with a large part of the success of the Department's activities.

Dean Garrison Named Referee by Mediation Board. One of the earliest appointments by the National Defense Mediation Board was the naming of Dean Lloyd K. Garrison, of the Law School of the University of Wisconsin, as referee in management-union disputes at the Milwaukee plant of the Allis-Chalmers Manufacturing Company. Dean Garrison will act under a provision in the agreement reached April 6, which ended the strike between the Company and the United Automobile Workers, wherein it was provided that if the management and the union failed jointly to name a referee within five days, one would be named by the Board. Dean Garrison is a member of the Board of Directors and of the Arbitration Law Committee of the American Arbitration Association.

Professor Taylor Succeeds Dr. Millis in Automobile Industry. Prof. George W. Taylor, of the University of Pennsylvania, has been appointed impartial umpire to act in differences arising out of the labor agreement in effect between General Motors Corp. and the United Automobile Workers. Following the resignation of Dr. Harry A. Millis, who left the post to head the National Labor Relations Board, a number of unsettled grievances accumulated in the relations between the management and the union, some of which threatened to affect defense production work. Immediately after the naming of Professor Taylor to succeed Dr. Millis, hearings began in Detroit on the most pressing grievance cases.

* See p. 146.

Associate Professor of Industry at the Wharton School of the University of Pennsylvania, Professor Taylor has gained prominence as a labor arbitrator over a period of twelve years, during which time he has successfully settled more than 1,400 disputes in the men's clothing, hat, hosiery and textile industries.

Los Angeles Court to Handle Only Labor Cases. A special department of the Los Angeles Superior Court has been designated to handle cases involving labor relations and is probably the first court in the United States to devote its attention exclusively to litigation arising from labor difficulties.

In establishing the labor court, Presiding Judge Schauer said: "It is hoped that through fairness of approach, thoroughness of investigation and firmness and uniformity of action, the destructive results both to persons and the public interest, which characterize less enlightened treatment, may be substantially avoided."

Compulsory Arbitration Debated. Under the auspices of *Modern Industry*, the new industrial management magazine, the question: "Should Compulsory Arbitration of Labor Disputes be Instituted in Defense Industries?" was debated in the February 15th issue of the magazine, and on the radio over the Blue Network of the National Broadcasting Company on February 14. Representative E. E. Cox, of Alabama, Congressional proponent of legislation outlawing strikes and requiring the compulsory arbitration of labor disputes, argued the affirmative of the question in print and on the air. Compulsory arbitration was opposed in the magazine's "debate" by C. V. Whitney, president of the American Arbitration Association, and on the air by Paul Felix Warburg, a director of the Association.

A poll of radio listeners conducted by the magazine indicated that 49 per cent favored compulsory arbitration and 51 per cent opposed it. A survey of opinion among the magazine readers (50,000 industrialists in 31,500 plants that produce 89 per cent of the nation's goods) disclosed a national advocacy of compulsory arbitration by a margin of 68 per cent to 32 per cent.

Labor Arbitration in the Broadcasting Industry.* Arbitration is a well established principle in the labor policy of the broadcast-

* Contributed to the JOURNAL by Joseph L. Miller, Director of Labor Relations, National Assn. of Broadcasters.

ing industry. Its extension is constantly advocated by the National Association of Broadcasters as fundamental to the development of sound labor relations.

Every contract between stations and the International Brotherhood of Electrical Workers and the American Communications Association, the dominant technicians' unions, provides for arbitration of disputes arising under the terms of the contract. Some of these contracts go even further in providing for the arbitration of *any* dispute that arises during the term of the agreement. The unions, in some instances, have been hesitant in accepting the latter type of provision. Arbitration of *all* disputes, however, guarantees a peaceful relationship between the employer and the union for a given period of time, and makes the employer far more willing to bargain collectively in good faith than if he is faced with the possibility of "wild cat" strikes after a contract is made. There is a great variation in the provisions of technicians' contracts concerning the method of selecting arbitrators. The American Arbitration Association, the U. S. Department of Labor, local judges, National Labor Relations Board, and the permanent panel of the American Newspaper Publishers Association and the Printing Pressmen's Union are among those specified in contracts as arbitrators or as appointing agencies.

All contracts with the American Federation of Radio Artists, the dominant union of announcers, singers, and actors, provide for arbitration of disputes arising under the contract by the American Arbitration Association. The American Federation of Musicians, the other principal union in the broadcasting industry, both nationally and locally has refused to insert arbitration provisions in its agreements. These agreements usually have provided for the reference of disputes to the national officers of the union—an arrangement obviously unsatisfactory to the employers.

Arbitration Protects Aircraft Company. Another company in the aircraft industry has protected itself and its 1,000 employees against strikes and stoppages due to labor disputes. On March 27, the Solar Aircraft Company, of San Diego, one of the largest manufacturers of exhaust manifolds for military planes, entered into a contract with its workers in which it was agreed that "in mutual recognition of the national emergency" and the

President's appeal for "industrial peace and cooperation between organized labor and management in war industries," the Company shall not engage in lockouts or other unfair labor practices, and the Union is bound not to permit its members to engage in any strike, walkout, sit-down, "slow-down," or any similar activity, except in the event the Company refuses to be bound by arbitration. The parties waive the right to appeal from an arbitrator's award, which in each case is to be entered as a judgment in the local Superior Court.

Truckmen Promote Industrial Peace in National Emergency. An arbitration agreement which will run for two years was reached on February 9, 1941, by three groups of employers—the Merchant Truckmen's Bureau, Highway Transport Association and the Master Truckmen of America—and the International Brotherhood of Teamsters, Locals 282, 807 and 816, as a result of which it is expected that New York will obtain relief from the plague of "quickie" strikes that have disrupted the industry for many years. Nearly 15,000 drivers are covered by the wage scale agreement signed last October, which the arbitration agreement is designed to supplement.

By unanimous vote of both management and employees, Hugh E. Sheridan will serve as impartial chairman under the agreement, with offices at 255 West 14th Street, New York City. An advisory board made up of an equal number of representatives of both parties will assist Mr. Sheridan, but sole authority to make decisions will rest with him, and they will be binding upon all parties. Mr. Sheridan occupies the unique position of holding a union card and being the head of a trucking firm and former president of the Merchant Truckmen's Bureau. A previous attempt to set up official arbitration machinery failed because of the inability of management and labor to agree upon an impartial chairman.

ACCIDENT CLAIMS ARBITRATIONS

SINCE October 1, 1933, the American Arbitration Association has maintained a Tribunal for the arbitration of personal injury and property damage claims, or negligence cases. The following is a report on this Tribunal.

HISTORY OF THE TRIBUNAL

The relentless advance of the machine age and its ever-increasing importance has brought with it a situation which presents a difficult problem for our courts. Because of the important part played by machines in our daily lives, disputes inevitably arise concerning their use. Consequently large numbers of claims for personal injuries and property damage find their way to court calendars and create a congestion that in many cases results in expensive delay. Some calendars were as far behind as three years in 1933. A method of alleviating this condition had to be found. The Municipal Court Code of the City of New York empowered the Board of Justices of that Court to establish and promulgate a set of rules by which arbitration could be made available. The assistance of the American Arbitration Association was sought to organize a Tribunal to handle tort cases, particularly those involving negligence.

In 1933, the Association organized such a Tribunal for the determination of negligence claims pending in the courts. This was accomplished with the approval and cooperation of the President Justice of the Municipal Court. George S. Van Schaick, former State Superintendent of Insurance, was one of the staunchest supporters of the movement, since the court calendars were clogged with cases defended by insurance companies. Louis H. Pink, the present Superintendent, has continued to show the same interest in arbitration as his predecessor. Since 1933 the Tribunal has had some 10,000 cases referred to it, and in its treatment of them has shown itself to be impartial and unbiased. The Association's only interest in the outcome of a case is its desire that any award made by an arbitrator is just, valid and final.

ARBITRATORS

The Association maintains a Special Panel of 350 arbitrator-lawyers, who have been chosen for their integrity, knowledge and familiarity with judicial procedure. Each one has been approved, after thorough and diligent investigation of his background, by a Special Committee of Lawyers. The arbitrators volunteer their time and ability as a public service, without compensation. This fact greatly reduces the cost of arbitration to all concerned.

PROCEDURE

In disputes other than those arising from torts, the parties have some common ground upon which to stand. In many cases they agreed upon arbitration when they entered into a contract. In a sense, the parties anticipated the possibility of disputes and disagreement arising between them. A tort action presents an entirely different problem. In 99 per cent of the cases, the parties to a tort action have had no prior experience with each other. They have not previously agreed to arbitration. The first indication a person has that there is an existing controversy between him and another is usually the serving of a summons. Hence arbitration is a purely voluntary method of disposing of pending litigation. No order can be made by a court compelling the parties to a tort action to arbitrate.

Any party may file a pending court case with the Association. When doing so, the party or attorney includes the name, address and telephone number of the opposing party or counsel. Upon receiving the necessary information, the Department of the Association concerned with tort actions, addresses a letter to the opposing party or counsel inviting his consent to arbitration. This letter is followed by one from the President Justice of the Municipal Court, urging consent.

When the consent of all parties involved in the action has been obtained, a date for hearing is set. This is done with a view to the convenience of parties, attorneys and arbitrators. The hearing proceeds along lines similar to the procedure in court, although less formal. There is no audience or other distraction that might disturb the parties or the orderly conduct of the hearing.

When the testimony has been heard, the arbitrator, after due consideration, renders his decision, which is termed an award. The Civil Practice Act, Section 1446, provides that a judgment entered upon an arbitrator's award "has the same force and effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in an action in the court in which it is entered."

SUMMARY OF THE DISPOSITION OF CASES SUBMITTED

Since October 1, 1933, up to and including March 31, 1941, 10,151 cases have been filed with the Insurance Arbitration

Tribunal of the Association. Of this number, 9,988 have been disposed of as follows:

Awards	1,658
Settled after complaint was filed	3,813
Unable to obtain Consent	4,517
Pending April 1, 1941	163
Total	10,151

More than 55 per cent of the cases filed are finally determined by an award or by settlement. Those cases in which consent cannot be obtained and are not otherwise disposed of, must be tried in the courts.

ARBITRATION LAW

ARBITRATION AND PUBLIC POLICY

JULIUS HENRY COHEN *

I

IN THE UNITED STATES LAW WEEK for February 4, 1941, there appeared a note to the effect that the Minnesota Supreme Court had shortly before held that an

> "Agreement for arbitration of all disputes arising under contract is not void as against public policy on ground that it ousts courts of jurisdiction.
>
> "In so far as earlier decisions declare such an agreement is contrary to public policy 'they are overruled . . . . notwithstanding their accord with a prevailing view of decision law elsewhere. American Law Institute Restatement of Contracts, Sec. 551.'
>
> "There was never any factual basis for holding that an agreement to arbitrate 'ousted' jurisdiction. Arbitration 'is no more an ouster of judicial jurisdiction than is compromise and settlement or that peculiar offspring of legal ingenuity known as the covenant not to sue.'
>
> "Furthermore, the legislature has declared what the public policy is by providing in the statute that 'nothing herein shall preclude the arbitration of controversies according to the common law.'
>
> "The conclusions reached are not precluded by the doctrine of *stare decisis* since that is merely a guiding policy rather than an inflexible rule." [1]

This news was most encouraging, for it seemed that at long last the courts were beginning to recognize that the doctrines which had heretofore governed their decisions in this field were indeed anachronisms in the law and should be declared to be obsolete.

II

Those of us who are interested in the development of the law of commercial arbitration were, of course, keen to read the

* Member of the New York Bar and of the Arbitration Law Committee of the American Arbitration Association; author of COMMERCIAL ARBITRATION AND THE LAW (1918).

[1] United States Law Week, Feb. 4, 1941, Vol. 9, Sec. 2, p. 2446—Minn. Sup. Ct. (Stone, J.); *Park Construction Co.* v. *Independent School District No. 32*, Jan. 17, 1941. (Gallagher, C. J., and Peterson, J., dissent.)

opinions and briefs in the case. The decision appears now in the NORTH WESTERN REPORTER for March 19, 1941.[2] There is a prevailing opinion by Justice Stone, concurred in by two of his associates, and a strong dissenting opinion by Justice Peterson, concurred in by the Chief Justice, Gallagher. There is a petition for rehearing, with a supplementary correction by Justice Stone, with denial of the petition.

From the point of view of those who have hoped for more than a quarter of a century that American courts could be induced to reverse this ancient error in the common law, the opinion of Justice Stone is more than satisfactory. The award in the case was made despite the opposition of one of the parties, but was not valid under the Arbitration Statute of Minnesota.[3] It thus presented the question of whether an arbitration agreement not made under the statute was valid as a common law arbitration agreement. To arrive at his result, Mr. Justice Stone and his two colleagues were obliged to admit that

> " . . . . Our conclusion opposes that of many earlier decisions of this court,"

and because these prior decisions ruled

> "that a general agreement to arbitrate all differences to arise under a contract is contrary to public policy and therefore void," [4]

the Minnesota Supreme Court now definitely overrules them.[5]

"For this departure from a doctrine of long standing," the Court declares, "we make no apology." We find the reasons assigned "are so compelling as to allow no other course." Further, we find that, if there is to be an apology, it "should be rather for the regrettable fact that our decision law did not promptly reflect the legislative declaration."

[2] North West. Rep., Vol. 296—No. 5, pages 475, *et seq.*, *Park Const. Co.* v. *Indep. School Dist. No. 32.*

[3] 2 Mason Minn. St. 1927, Sec. 9516.

[4] N. W. REP., *ibid.* p. 478.

[5] Says the Court:

> "They [earlier decisions] include: *Gasser* v. *Sun Fire Office*, 42 Minn. 315, 44 N. W. 252; *Whitney* v. *National Masonic Acc. Ass'n*, 52 Minn. 378, 54 N. W. 184; *Aaberg* v. *Minnesota Commercial Men's Ass'n*, 152 Minn. 478, 189 N. W. 434; *Abramowitz* v. *Continental Ins. Co.*, 170 Minn. 215, 212 N. W. 449; *Glidden Co.* v. *Retail Hardware Mut. Fire Ins. Co.*, 181 Minn. 518, 233 N. W. 310, 77 A. L. R. 616. They are disapproved notwithstanding their accord with a prevailing view of decision law elsewhere. Restatement, Contracts, Sec. 551."

III

The minority opinion reviews the law as it stood prior to this reversal, presents the readily available and cumulative citations which establish that it is the present common law, and refuses to accept the view that there should be a change in the attitude of the courts towards this factor of public policy. The key to the guiding temper of the minority is to be found in the following paragraph:

> "Interested groups keep the pressure on in favor of arbitration. Arbitration 'is rarely damned publicly.' That it is not 'an unfailing panacea for satisfactory resolution of business controversies' is being demonstrated by experience. Except in certain cases, arbitration is not as speedy, friendly, or effective as its champions claim. In the light of these facts, there is all the more reason why we should adhere to settled rules until the legislature shall enact a different rule. See Phillips, *A Lawyer's Approach to Commercial Arbitration*, 44 YALE L. J. 31. The instant case with all its acrimony, delay, litigation and expense ($900 for arbitrators' fees in addition to attorneys' fees and other expense of the parties to arbitrate a $3,300 claim) is not unlike many other similar cases cited by Mr. Phillips." [6]

In short, the two dissenting Justices of the Supreme Court of Minnesota belong to that long line of eminent judges of England and this country who do not believe in commercial arbitration and are "agin' it." Naturally, the two Justices find congenial company among their great predecessors. But there have been great judges who felt otherwise, with whom the minority here refuse to march. One of the ablest Federal judges of our day, who has since passed away, was the Hon. Charles M. Hough, of the District Court, Southern District, New York. In 1915 he wrote, in the *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*[7] case that he could find no basis in reason for the existing law in this field. He said:

> "There has long been a great variety of available reasons for refusing to give effect to the agreements of men of mature age, and presumably sound judgment, when the intended effect of the agreements was to prevent proceedings in any and all courts and substitute therefor the decision of arbitrators. The remarkably simple nature of this libelant's contract breaking has led me to consider at some length the nature and history of the reasons adduced to justify the sort of conduct, by no means new, but remarkably well illustrated by these libels." [8]

[6] N. W. REP., *ibid.* p. 485.
[7] 222 FED. REP. 1006.
[8] *Ibid.* p. 1007.

He found that the hostility of English speaking courts to arbitration contracts arose out of the "contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction," (Lord Campbell, in *Scott v. Avery*, 4 H. L. Cas. 811).[9] Upon this Judge Hough commented:

> "A more unworthy genesis cannot be imagined."

In his opinion Judge Hough went into the doctrine of revocability, its origin, and said, concerning "the public policy" doctrine:

> "No reason for the simple statement that arbitration agreements are against public policy has ever been advanced, except that it must be against such policy to oust the courts of jurisdiction." [10]

And, finally:

> "Having built up the doctrine that any contract which involves an 'ouster of jurisdiction' is invalid, the Supreme Court of the United States has been able of late years to give decision without ever going behind that statement." [11]

IV

Maule, a great English judge, called the doctrine of revocability an "inveterate error." [12] Lord Cranworth, Chancellor, in *Drew v. Drew*, called the doctrine "an *inconvenient*, and, I think I may be allowed to say, *an irrational state of the law* . . . . I say that was an absurd state of the law. . . . ." [13]

Judge Hough was a judge who never hesitated to express his own opinions, even if he found that they were opposed to settled law—though, obviously, as a District Court Judge, he was obliged to follow the decisions of the United States Supreme Court, and did so, indeed, in the *Trinidad* case.

But it was this daring opinion of Judge Hough which stimulated the writer to make the studies contained in COMMERCIAL ARBITRATION AND THE LAW (published in 1918), and to gather in that volume the already substantial evidence that there was

[9] *Ibid.*
[10] 222 FED. REP., *ibid.* p. 1008.
[11] 222 FED. REP., *ibid.* p. 1009.
[12] *Northampton Gas-Light Co.* v. *Parnell*, 15 C. B. 630, 645, 80 ECL 630, 139 English Reprint 572.
[13] MACQUEEN'S CASES ON APPEAL, pp. 3, 4 (Scotch, 1855). Italics supplied.

no basis whatever for the claim that commercial arbitration was against public policy. In Chapter III, the writer found no difficulty in finding support in many historical references for the definite viewpoint that public policy favored arbitration. It was lawyers and judges who thought otherwise.

Today there is a greater volume of experience in dealing with this subject, and an even stronger case to be made to show that, as the Minnesota Supreme Court now holds (3 to 2), public policy favors common law arbitrations. The contrary doctrine never was sound. In the light of modern events, however, the Courts should the more readily reverse this ancient error. The fact that one high court in our country—even by a vote of 3 to 2—has done this, is most encouraging and leads to the hope that upon more complete presentation of the factual data available, even the United States Supreme Court may be induced to reverse its decisions in this field. It is now the accepted policy of the United States Supreme Court to reverse older decisions, where it finds a change in or better understanding of the social and economic factors involved.[14] But it should be profitable to those of us who are in what the Minnesota Supreme Court minority calls the "interested groups" to understand the weight of the opposition. It will not be enough to rely upon the fact that bar associations throughout the country, especially the Association of the Bar of the City of New York, and leading lawyers are now active supporters of the system of commercial arbitration. There must be a finer and more subtle understanding of the basis of the opposition. Some of us have warned many times that the proponents of arbitration must not present it either as a panacea or as a substitute for the administration of justice in the courts. We know too well that we were able to secure the initial legislation in this field only by making the whole system of arbitration a part of our judicial machinery.

[14] Some writers believe that it has already swung too far in this direction. Note criticism of Prof. Arthur L. Corbin, in YALE L. J., Vol. 50, No. 5, March 1941, *The Laws of the Several States*, pp. 762, *et seq.* It should be kept in mind by those concerned that, since *Erie R. R.* v. *Tompkins* (reversing *Swift* v. *Tyson*) criticized in this article by Prof. Corbin, the Federal Courts will be obliged, in suits by citizens of one State against another, to follow the common law of the States, though, of course, as always in Admiralty cases and other cases where Federal courts have exclusive jurisdiction, they are at liberty to determine what is the "Federal Common Law."

V

Now, let us face the facts squarely: Even after statutes legalizing arbitration were adopted in England, English judges still persisted in their opposition to common law arbitrations. In our own country the Bar divided very sharply. In 1925 the United States Arbitration Law was adopted by Congress upon the initiative of the Committee on Commerce, Trade and Commercial Law of the American Bar Association. For over four years, with the endorsement of the American Bar Association, this bill was pressed and, with the support of businessmen throughout the country, became a law. This was while the Honorable Charles E. Hughes was President of the Association. Notwithstanding this action during 1920-1924, in 1925 the Committee of the Commissioners on Uniform State Laws came to the American Bar Association meeting, and in effect repudiated the work which had been done by the Committee on Commerce, Trade and Commercial Law, under the instructions of the Association, with its approval and with the approval of its President, Mr. Hughes. In support of these views, it was urged that "it was not safe for men to agree to arbitrate in advance of what might come." [15]

The Committee of the Commissioners on Uniform State Laws, according to one spokesman, felt that

> " . . . . it was unfair to business men to allow them to sign a contract which they knew nothing about, and then find themselves utterly helpless when the disagreement arises. Nor did they want some farmer, mechanic or laborer, to enter into such a contract with some of the great interests which have to do with the necessities of life, and find himself later helpless in the face of such a situation. The Association should not countenance a policy which forecloses recourse to the courts and to that extent follow the example of Russia, where they have closed down the courts and taken the lawyers and put them to work in the fields and the factories." [16]

Another member of the Committee on Uniform State Laws said:

> "I think that every careful lawyer would say, 'I cannot advise you to submit a subject to arbitration when I do not know what that subject is. I cannot advise you to arbitrate and give up your rights to have your question adjudicated by the courts unless I know first what your question is.' " [17]

[15] AMER. BAR ASSN. JOURNAL, Vol. XI, No. 9, Sept. 1925, p. 614.
[16] AMER. BAR ASSN. JOURNAL, *ibid.* p. 614.
[17] Reports of Amer. Bar Assn., Vol. L, 1925, p. 158.

Mr. Nathan William MacChesney, for years active in the National Conference of Commissioners on Uniform State Laws, permitted himself to go so far as to say that an arbitration law permitting business men to agree to submit to arbitration in advance of disputes that might thereafter arise

> "would put into the power of men controlling business of the great cities, and I speak not only from the standpoint of a lawyer, but from the standpoint of great commercial and financial interests as well, of the second city of this country, when I say that it is their point of view, that it would make it possible for the financial and the controlling credit agencies to require people of lesser standing who had to do business with a city like Chicago, to accept such a provision whether they desired to do so or not. So that its incorporation in such a contract constitutes *a species of duress for the waiver of constitutional rights.*" [18]

Mr. John Hinkley, of Maryland, another leader of the Commissioners on Uniform State Laws, stated that a man who signs such an arbitration agreement

> "signs away his birthright, his right to have his controversy tried by the law of the land in the tribunals instituted for that purpose."[19]

The Commissioners were able to secure a vote of the American Bar Association at this meeting of 175 to 26 in their favor, despite the fact that the record carefully laid before the Association demonstrated that for over a period of four years the Association had, through its appropriate committee supported the efforts to secure enactment of the present United States Arbitration Law.[20]

However, only three years later, at the Seattle meeting of the American Bar Association, the Association returned to its original policy. At that time its Committee on Trade, Commerce and Commercial Law reviewed several years of study of the whole subject of prevention of *industrial* disputes, and came to the conclusion that the solution lay in encouraging voluntary agreements to arbitrate such disputes. In its report made to the Seattle meeting, it set forth the history of the Association's movement in the field of commercial arbitration, and recommended that it apply the same policy in the field of industrial disputes. It presented a wealth of material in the way of support from organized

[18] Reports of Amer. Bar Assn., *ibid.* p. 137.
[19] Reports of Amer. Bar Assn., *ibid.* p. 156.
[20] Reports of Amer. Bar Assn., *ibid.* pp. 138, *et seq.*

labor and lawyer groups and the public generally. The Association, by an overwhelming vote, endorsed its recommendations.[21]

So far as the policy of Federal law in this field is concerned, the American Bar Association, on this 1928 record, stands foursquare in support of the principle that arbitration agreements to settle future disputes, when freely and voluntarily made, are not against public policy.

The future historian of the progress of arbitration in this country will find it very interesting to compare the records of the proceedings of the 1925 meeting of the American Bar Association at Detroit and the Seattle meeting in 1928 with the record of the proceedings of the Association of the Bar of the City of New York in this field in 1941, where lawyers of distinction, over the radio and in other ways, urge the use of arbitration machinery.

VI

When the two of the five Justices of the highest court of Minnesota still remain of mind that experience demonstrates ground for adhering to the settled common law doctrine, their opinion should be squarely countered, not by unreasoned criticism, but by careful analysis of the factual situation, and presentation of the merits of arbitration, not as a competitive substitute for litigation but as a preventive of litigation. Such an agency as the American Arbitration Association could and should submit, as *amicus curiae*, the overwhelming evidence which establishes the amount of actual satisfaction secured through these processes of commercial arbitration. The recent endorsement of the whole principle by the Federal courts in the motion picture industry—its induction into the machinery of administering a court decree—is another piece of evidence establishing as a fact the substantial contribution which this piece of machinery in the administration of justice can and actually does make.

As this article is written, the New York Times reports that some 22 impartial chairmen (arbitrators), acting under collective bargaining agreements in various industries, are offering their help to aid the Government in the present emergency with

[21] See Report of Proceedings 51st Annual Meeting, American Bar Assn., Seattle, July 25-27, 1928, Vol. 53, especially pp. 349, *et seq.*, and the remarks of the writer at page 110, *et seq.*

their experience in the prevention of labor disturbances through arbitration voluntarily agreed upon in advance of disputes. They intend to become an organizing group, and to enlist some 7000 arbitrators throughout the country in their work. Among them are included many lawyers.[22]

The millions of workers who find in such arbitrations under collective agreements a satisfactory and fair way of settling grievances apparently do not need the guardianship of the courts to protect them in these processes. As a matter of fact, they now invoke the aid of the court to force the award of arbitrators when made. In one case they successfully contended that, though the State statute contained the provision that enforcement shall not apply to "contracts pertaining to labor," it was not intended to exclude arbitration under collective bargaining agreements between a union and an employer.[23]

The majority opinion in the Minnesota case says:

> "In the field of industry, a chorus of deserved derision would silence declaration that a collective bargaining agreement for arbitration of future issues was violative of public policy." [24]

What is the explanation for this persistence of the opposition of judges and lawyers to the use of arbitration even when agreed to, as Judge Hough said, by "men of mature age and presumably sound judgment," and who intend thereby "to prevent proceedings in any and all courts and substitute therefor the decision of arbitrators?" [25] Well, first of all, I think we lawyers must plead *mea culpa*. We have insisted as lawyers that the Bar should have a complete monopoly of all machinery for the administration of justice. It will not do for us to say that that is precisely what the medical profession has done in its field. The American Medical Association does insist upon control by the medical profession in all matters dealing with health. According to this teaching, one should not even be permitted to use a masseur, or an osteopath, or a chiropractor, unless some member of the medical profession sanctions it!

[22] The New York *Times*, Saturday, March 29, 1941, p. 7.

[23] *Levy* v. *Superior Court*, 104 P. (2nd) 770 (Calif. 1940), referred to in *Notes on Recent Cases*, 54 HARV. L. REV. 500.

[24] N. W. REP., *ibid.* p. 477.

[25] 222 FED. REP., p. 1007.

VII

Now, it will not do to say that this effort toward complete monopoly by the legal profession in its field, and by the medical profession in its field, is the result wholly of the unworthy purpose of maintaining a grip on the emoluments of the professions. Men of high purpose have shared the view that it was. I think the true explanation is to be found in the fact that the expert knows better than the layman the dangers of the use of the implements which he uses. The whole movement in the direction of prosecuting laymen for practicing law unlawfully, though doubtless influenced in many ways by the economic condition of the Bar, rests fundamentally upon the philosophy that laymen must be safeguarded by lawyers in the field in which they need legal advice and legal protection. The present movement in the direction of regulating the conduct of quasi-judicial tribunals now under discussion is fundamentally due to the fact that lawyers know that, if there is to be law, there must be lawyers, and there must be courts to protect the citizen. Dean Roscoe Pound has paid his respects to the philosophy which runs counter to this.[26]

It is but fair, therefore, to recognize that the continuity and persistence of the opposition on the part of the Bench and the Bar to the use of arbitration has been due to the fundamental feeling, based on long experience, that laymen cannot be relied upon to protect their own rights, and that they would foreswear their protection under the law unless they were guarded against themselves. In the days when there was ignorance and illiteracy, there was always the danger that men would sign away their rights. Accordingly, we must say that it is the desire of the Bench and Bar to protect the inalienable rights of the citizen, which leads to the feeling that anything which they think is an attempt to "oust the courts of jurisdiction" is against public policy.

This prejudice against arbitration has, however, actually been overcome in the minds of judges and lawyers through realistic, practical experience. Management by trade bodies or by associations like the American Arbitration Association or the Cham-

[26] See his article, *The Place of the Judiciary in a Democratic Polity*, AMER. BAR ASSN. JOURNAL, March 1941.

ber of Commerce of the State of New York demonstrates that, with carefully selected arbitrators, with rules governing their conduct, and such guidance as is contained in the handbooks issued by the two associations, the criticisms that have heretofore been made are completely met and overcome. This, too, is confirmed by the long experience in this field in England.

VIII

Herbert Harley, Secretary of the American Judicature Society —that real pioneer in law reform—wrote in October 1916, for the Bulletin of the Society:

> "The present universal fear of litigation, with its slow and costly procedure and interminable appeals, is a principal reason for this irregular method of reaching a settlement—for it ought not to be dignified by the name of arbitration. Its fault is not merely that of inexpertness but that it is dominated by compulsion, not by mutuality. Arbitration is the means by which this growing function is to be methodized and regulated in a public manner. It should be viewed, not as hostile to courts but as a special method of adjudication adapted to certain modern needs, a new arm of the law supplementing courts in a practical way.
>
> "New ways of living and transacting business imply new machinery in the law. Society is constantly devising new tools to accomplish its work more economically. Commercial disputes, aside from their technical nature, are different in an essential way. In the law the rendering of exact justice in the matter presented is a final aim. But in business the settlement of a given dispute is not the most important thing. The big thing is the relationship between the parties. In its formal tribunals the law must ignore this preservation of relations between the parties, however momentous.
>
> "The essential difference appears to be that compulsion is the central feature of judicial procedure, while mutuality and voluntary submission underlie arbitration, giving it validity and affording a basis for successful continuance of business relations. Arbitration is thus seen as a constructive social function weaving into the fabric of commercial life to strengthen rather than sever its threads." [27]

The Judicature Society indeed engaged Samuel G. Rosenbaum, of the Philadelphia Bar, to make a study of commercial arbitration in England. The result of his seven months' study, published in 1915, forms a part of the report of the American Judicature Society known as Bulletin No. XII. I have quoted some of the evidence found by Mr. Rosenbaum in COMMERCIAL ARBITRATION AND THE LAW.[28]

[27] COMMERCIAL ARBITRATION AND THE LAW, pp. 18-19.
[28] P. 19, *et seq.*

By intervening as *amicus curiae* in a number of arbitration cases, the New York State Chamber of Commerce and the American Arbitration Association were able to bring to the attention of the Court of Appeals of the State of New York those factors of public policy which influenced that Court in its present liberal policy toward the law.

IX

Turning again for a moment to the "ancient error," the minority opinion in the Minnesota case, in a footnote to page 480-481, refers to my study, COMMERCIAL ARBITRATION AND THE LAW, in which, it says, the author "essayed," in Chapter IX, to prove that there were authorities prior to the Vynior Case contrary to Coke's dictum. There is not space here to go into the minority criticism of this "essay," but if anyone will take the pains to compare the criticism in the minority footnote with the material in the chapter itself, he will find it difficult to accept the criticism. It is a little discouraging to find, however, that the minority judges must have closed the book after reading this one chapter (for which they can readily be forgiven, since it is very dry in spots). However, if they had read some of the other chapters—especially those preceding Chapter IX—and brought to the reading some modicum of judicial tolerance for information on this subject, they would have found it difficult to have said what they did say.

The two learned minority Justices are convinced that Lord Coke "knew" his common law. Coke not only knew the common law. He *was* the common law! When he said something, even though it were but a dictum, it made such an impression in the law that for more than three centuries it has had its influence, as we have seen, on Bench and Bar both in England and in this country.

However,

> "I am afraid," said Chief Justice Best, "we should get rid of a good deal of what is considered law in Westminster Hall if what Lord Coke says *without authority* is not law." [29]

[29] COMMERCIAL ARBITRATION AND THE LAW, p. 138. See also other references for Coke's fallibility. The opposition of Coke and the Common lawyers to the Court of Admiralty is referred to by Holdsworth, in his SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, Vol. 1, p. 319, as "unscrupulous."

Sayre, in his article, *Development of Commercial Arbitration Law*, after discussing *Vynior's Case*, and pointing out that the decision covered only the matter of recovery on the bond, and that Coke's utterance as to the revocability of arbitration agreements was indeed but a dictum, goes on to say:

> "It is to be remembered further that at the time of *Vynior's Case* the entire law of contract was in its infancy and no such general rights of recovery upon promises as obtain today were then to be had. The almost invariable practice was to insure performance of any agreement through putting the obligee under bond. Then if he failed to perform, you had a straight suit upon the bond, which was made sufficiently large to protect you fully. When the courts allowed recovery on the bond they had done all that in practice was reasonably needed to make arbitration effective. *It seems clear that if in fact the courts were jealous of their jurisdiction or were suspicious of arbitration, or for any other ulterior motive wished to prevent its efficacy, they would have declared directly that such agreements were against public policy and held any bond made as security for the performance of such an agreement a nullity. It was of course perfectly possible for the court to do this where it felt that the object of the bond was immoral or illegal or for any other reason was not to be countenanced by the law.*" [30]

The minority in the Minnesota Supreme Court say that

> "After all, the revelations incident to searching the origin of a rule of law may be quite as shocking as those in tracing a family tree," [31]

yet they refuse to follow Lord Campbell and Judge Hough in the conclusion that the origin of the doctrine in the law was the desire of the judges to add to their jurisdiction—the theory of "judicial jealousy." They support their criticism of Lord Campbell by arguing that the English courts, as a matter of fact, were favorable to arbitration. Thus, they say:

> "Lord Campbell's assertion appears to be groundless. He does not substantiate his statement with any evidence or citation. The available evidence is against him. In 1648, which was just 40 years after the decision in Vynior's Case and over 200 years before the decision in *Scott* v. *Avery*, March stated in his treatise on SLANDER AND ARBITRAMENTS, p. 262, that the law seemed favorable to arbitration. Referring to the act of 1698, Blackstone said that the legislature encouraged arbitration because of 'the great use of these peaceable and domestic tribunals.' 2 BLACKSTONE, Bk. 3, pp. 15-17." [32]

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[30] *Development of Commercial Arbitration Law*, by Paul L. Sayre, 37 YALE L. J. 603 (March 1928). Italics supplied.

[31] Adv. Sheets, N. W. REP., *ibid.* p. 486.

[32] *Ibid.*

The minority say again:

> "If the courts wanted to put an end to agreements to arbitrate and thus terminate arbitration, the result could have been accomplished by simply declaring such contracts illegal as against public policy. Quite to the contrary, the courts recognized the validity of contracts to arbitrate and enforced bonds given to secure their performance. The remedy on the bond of recovery of the full face amount effectually enforced the agreement to arbitrate. The courts so far from showing hostility to arbitration did everything permissible under the then existing law to make it effective. 37 YALE L. J. 603." [33]

Quite so! So long as there was no difficulty in enforcing fines or penalties, recovery of a heavy penalty on a bond supporting an agreement to arbitrate—even of future disputes—was indeed giving the plaintiff often much more than his actual damage. As all students agree, it was when "fines and penalties" were abolished that the courts slipped into the erroneous doctrine of "ouster jurisdiction."

However, it would not have been difficult to follow men like Jessel, Master of the Rolls, a great equity lawyer, and to apply the remedy of specific performance, as the courts are now practically doing under the New York and Federal statutes. This would have been done but for the persistent bias of judges and lawyers, now to be found once more disclosed in the minority opinion of the Minnesota Court, and illustrated in the quotations we have given from the proceedings of the American Bar Association.[34]

The minority Justices review the now discarded theory of revocation, as the revocation of an *agency*. They find, on the basis of authority, that

> "While an arbitrator is an agent, he is one of a special kind. His

[33] *Ibid.*

[34] See the repetitions of English quotations in the footnote in the minority opinion (page 487), citing Scrutton, L. J., almost in paraphrase of the opinions of the American lawyers we have quoted:

> "In my view to allow English citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy."

Or, as Bankes, L. J., said (footnote, page 487):

> *"To release real and effective control over commercial arbitrations is to allow the arbitrator, or the Arbitration Tribunal, to be a law unto himself, or themselves, to give him or them a free hand to decide according to law or not according to law as he or they think fit, in other words to be outside the law."*

agency is to judge, not to advocate. He is bound to act judicially as between the parties with all which that implies." [35]

In discussing this phase of the matter, Sayre says (page 598):

"(a) *Agency.* The doctrine of revocability as found in the Year Books and enunciated in *Vynior's Case* is based upon the authority given to the arbitrators and the consequent power to withdraw that authority. At that time there could be a valid oral submission in certain matters, but in other disputes, particularly those involving land, the submission to arbitration was not valid at all unless it were by deed. Also, of course, an executory oral contract was not enforcible and consequently the revocation of an oral submission violated no enforcible contract. Where submission is by deed, however, the case is different, since one could make an obligation by deed and have an action in debt for its nonperformance. The question, then, was whether a submission to arbitration by deed was of such a nature that it could be revoked. It should be understood that it was never held that such revocation could be done with impunity, because damages could always be had for it. The trouble has been, however, that the courts would award only nominal damages for such breach in the past, for they considered that there could not be serious damage to a litigant in forcing him to submit his case to their 'nice courts.' This was less significant in the early days when submission to arbitration was accompanied by a bond and the courts allowed full recovery on the bond where there had been revocation." [36]

After referring to Professor Mechem on the nature of agency, Sayre says:

"By the power granted in the submission, the arbitrators were authorized in their own right to judge the dispute impartially and not as agents of either or both parties thereto. The agency concept was not developed at the time the doctrine of revocability in arbitration contracts was evolved." [37]

X

Through the courtesy of the lawyers for both sides, we have now had the opportunity to read the briefs for both the Appellant and the Respondent and the Record of the case on appeal. The record shows that the case arose out of a contract for construction work between a school district and a construction company. The arbitration agreement appears in the margin.[38]

[35] Adv. Sheets, N. W. Rep., *ibid.* page 480.
[36] 37 Yale L. J., pp. 598-599.
[37] *Ibid.* pp. 599-600.
[38] Record *Park Const. Co.* v. *Indep. School Dist. No. 32,* Minn. Sup. Ct., pp. 2-4:

24. Arbitration. All questions subject to arbitration under this contract shall be submitted to arbitration at the choice of either party to the dispute.

The proceedings went forward to actual arbitration. Each party named an arbitrator, and the two arbitrators selected a third. Both parties appeared before the arbitrators by counsel.

The contractor shall not cause a delay of the work during any arbitration proceedings, except by agreement with the owner.

The demand for arbitration shall be filed in writing with the architect, in the case of an appeal from his decision, within ten days of its receipt and in any other case within a reasonable time after cause thereof and in no case later than the time of final payment, except as otherwise expressly stipulated in the Contract. If the Architect fails to make a decision within a reasonable time, an appeal to arbitration may be taken as if his decision had been rendered against the party appealing.

No one shall be nominated or act as an arbitrator who is in any way financially interested in this contract or in the business affairs of either the Owner, Contractor or Architect.

Unless otherwise provided by controlling statutes, the parties may agree upon one arbitrator; otherwise there shall be three, one named in writing, by each party to this contract, to the other party and to the Architect and the third chosen by these two arbitrators, or if they fail to select a third within fifteen days, then he shall be chosen by the presiding officer of the Bar Association nearest to the location of the work. Should the party demanding arbitration fail to name an arbitrator within ten days of his demand, his right to arbitration shall lapse. Should the other party fail to choose an arbitrator within said ten days, then such presiding officer shall appoint such arbitrator. Should either party refuse or neglect to supply the arbitrators with any papers or information demanded in writing, the arbitrators are empowered by both parties to proceed *ex parte*.

If there be one arbitrator his decision shall be binding; if three the decision of any two shall be binding. Such decision shall be a condition precedent to any right of legal action, and wherever permitted by law it may be filed in Court to carry it into effect.

The arbitrators, if they deem that the case demands it, are authorized to award to the party whose contention is sustained such sums as they shall deem proper for the time, expense, and trouble incident to the appeal, and if the appeal was taken without reasonable cause, damages for delay. The arbitrators shall fix their own compensation, unless otherwise provided by agreement, and shall assess the costs and charges of the arbitration upon either or both parties.

The award of the arbitrators shall be in writing and it shall not be open to objection on account of the form of the proceeding or the award, unless otherwise provided by the controlling statutes.

In the event of such statutes, providing on any matter covered by this article otherwise than as hereinbefore specified, the method of procedure throughout and the legal effect of the award shall be wholly in accordance with the said statutes, it being intended hereby to lay down a principle of action to be followed, leaving its local application to be adapted to the legal requirements of the jurisdiction having authority over the arbitration.

Witnesses were called and testified fully under oath for both parties, and all of the matters designated in plaintiff's demand for arbitration were fully tried and submitted to the arbitrators. All irregularities, if any, in the selection of the arbitrators and the setting of the hearing were waived, and the case was fully and completely submitted.

These facts, the Appellant contended, were taken as admitted, since the issue as to the validity of the award was raised by demurrer. On the other hand, the Respondent contended that it was the intention of the parties to submit to arbitration only under the Minnesota Arbitration Statute and that, under the Minnesota Statute, unless the award was confirmed by the Court, on motion, the award was not valid and could not be sued upon as a common law award—the statute being exclusive of any other remedy.[39]

The brief of the Appellant on Appeal, for purposes of the argument, did indeed concede that

> "the general rule that an agreement to arbitrate all differences which may arise in the future, whether such differences be of fact or law, are invalid and unenforceable." [40]

Furthermore, it conceded that

> "this rule rests upon the ground that such agreements are an attempt to oust the court of jurisdiction, and are contrary to public policy." [41]

But, conceding (for the purposes of the argument) that the provisions for arbitration in the original contract were not enforceable, the Appellant argued that the parties, having proceeded to name arbitrators, having designated the matters to be arbitrated, and having had full and complete trial of these issues—with no effort by either party to revoke the arbitration—

> "The injustice of now permitting either party who might be dissatisfied with the result to ignore this award is too apparent to need further argument." [42]

But as the Appellate Court held against the Respondent on the contention that the arbitration agreement was an agreement for a statutory arbitration, it was obliged to sustain the action as a common law suit to enforce an award, if it was to be en-

[39] Respondent's Brief, p. 20.
[40] Supplemental Brief of Appellant, p. 2.
[41] Supplemental Brief of Appellant, p. 2.
[42] *Ibid.* p. 9.

forced at all. However, the Minority need not have gone to the lengths it did since it could have found ample authority to support the contention of the Appellant that, even as the common law stood, it is too late to revoke after an award is once made. The award is then enforceable. There never was any difficulty in enforcing awards resulting from the actual participation by the parties in the arbitration. It was generally recognized that, if there were any right of revocation, it was waived by actual participation in the arbitration.

The authorities cited by Appellant's counsel in their supplemental brief clearly support the rule that, after arbitrators have acted and rendered an award, there is no longer opportunity for revocation even under the old law. Their decision is binding upon all the parties and can be successfully impeached only upon a ground which would invalidate any other judgment. The cause of action involved in the submission is merged in the award, and the award is a bar to a suit for such cause of action.[43]

The Minority opinion is a long one, rich in citation, showing considerable familiarity with the law and its history and, as we have seen, familiarity with the contentions made for and against arbitration agreements on grounds of public policy. However, reading of the briefs in the case discloses that what the Court did in reversing prior decisions on the doctrine of revocability was not done upon the initiative of either counsel in the case. The material upon which the Court relied for its review of the law of revocability was not supplied by the briefs of counsel for either side, nor was opportunity afforded to either of them to criticize any of the material supplied by the Court itself.

In view of the labors of the Minority, however, it might be pertinent to quote the following from the article to which they referred:

> "For the lawyer to resist the spread of arbitration would be as futile as the ill-fated experiment of King Canute." [44]

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[43] 5 *Corpus Juris*, p. 42, par. 68; STURGES, COMMERCIAL ARBITRATIONS AND AWARDS, p. 57, par. 18; *N. P. Sloan Co.* v. *Standard Chemical & Oil Co.*, 256 Fed. 451; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 68 LAW ED. 582; and other authorities recited on p. 8 of Supplemental Brief of Appellant.

[44] *A Lawyer's Approach to Commercial Arbitration*, by Philip G. Phillips, YALE L. J., Vol. 44, Nov. 1934, p. 52.

XI

The outstanding fact in the decision is that, in spite of the very vigorous and strong dissenting opinion of a minority which included the Chief Justice of the Supreme Court of Minnesota, the majority did definitely overrule the old "inveterate error," even going to the extent of apologizing for the failure of the courts to change the rule earlier.

It is probable that this case will suggest to other lawyers the raising of the same issue in other cases. When that time comes, it should furnish a fine opportunity for renewal of scholarly research in this field, the results of which could be presented to the court by the American Arbitration Association as *amicus curiae.*

COMMERCIAL ARBITRATION AND THE LAW was written twenty-three years ago. There is much more historical material which should now be examined, and the material in the book should be reexamined to discover such errors as undoubtedly occurred in its writing.

The brief of *amicus curiae* should support two points:—

(1) That the theory of ousting the courts of jurisdiction as against public policy is unsound in law and as a matter of fact.

(2) That Judge Hough was right when he found that there was no good reason why effect "should not be given to the agreements of men of mature age, and presumably sound judgment," and why courts should approve of what is, in essence, "contract breaking."

NEW YORK BAR SWINGS INTO ACTION

WILLIAM J. MACK *

IN the very nature of things there has been a community of interest between the American Arbitration Association and the Committee on Arbitration of the Association of the Bar of the City of New York that has been brought to fruition this year through the active cooperation of the representatives of both groups. On behalf of the Committee on Arbitration, and personally as well, I want to express here our deep appreciation of

* Chairman, Committee on Arbitration, Assn. of the Bar of the City of New York; Member of Arbitration Law Committee of the American Arbitration Assn.

the helpful interest shown by the staff of the Arbitration Association, who have devoted their time and thought to the solution of our common problems. The Committee on Arbitration, on its part, has endeavored to assist the American Arbitration Association in the accomplishment of its aims. Several members of our Committee are serving on its Panels of Arbitrators and on its Arbitration Law Committee.

The program outlined by the Committee on Arbitration for the year 1940-1941 was a full one. Happily, it has had considerable success.

In the field of legislation, through the good offices of two of the members of our Committee, Murray L. Jacobs and Robert L. Graham, Jr., and Assemblyman Parsons and Senator Mahoney, the Legislature has just passed, and the Governor has signed, our Bill to include as a justiciable and arbitrable dispute, under the law of arbitration, questions arising out of valuations, appraisals, etc. The purpose of this Act is to clarify the law and overcome the effect of the *Fletcher* case (237 N. Y. 440, 143 N. E. 248).

In the field of research, a sub-committee under the Chairmanship of Osmond K. Fraenkel, assisted by two N. Y. A. law students, whose services have been made available to the Committee by Professor Gifford of Columbia Law School, has engaged in a study of all cases in the New York and Federal Courts, concerned with any phase of arbitration. When the study is completed, it may lead to suggestions for amending the arbitration law and to a summary of the law and procedure.

A study has also been made of Arbitration in Defense Contracts by a sub-committee under the chairmanship of Meyer Kurz, who is also Chairman of a similar sub-committee of the Arbitration Law Committee of the American Arbitration Association.

Other sub-committees have made a survey of radio programs of so-called arbitration proceedings and have conferred with representatives of many trade organizations which in some cases prohibit, and in others discourage, the attendance of lawyers at arbitrations conducted under their auspices and rules.

During this season, as a result of conferences with representatives of the Committee on Labor and Social Security Legislation, the jurisdiction of the Committee on Arbitration has been definitely established as including the arbitration of labor disputes.

This will enlarge the Committee's field of activity in the future. It has had some effect already.

At the beginning of the season, the Committee on Arbitration decided to conduct Symposia or Round Table Conferences on various phases of arbitration. These were initiated by a general meeting at the Association of the Bar on January 18, 1941, attended by several hundred lawyers and others. The speakers included Mayor La Guardia; Mr. Justice Bissell, President Justice of the Municipal Court; Hon. Samuel Seabury, President of the Association, and Dr. Wesley A. Sturges of Yale Law School. The interest evidenced was so keen that the success of the future proposed conferences was assured. Additional conferences followed on February 27, 1941, on Commercial Arbitration and March 31, 1941, on Labor Arbitration. Dr. Sturges led the former and the latter was to have been led by Dr. John R. Steelman, Director of the U. S. Conciliation Service. At the last minute the emergency of the situation in the soft coal industry made it impossible for him to be present. Several of our able and goods friends came to the front and made the Conference one of unusual interest, with many points of view represented. Miss Frances Kellor and J. Noble Braden, representing the American Arbitration Association; Mrs. Emily Holt, presenting the organized labor viewpoint; Nicholas Kelley, a prominent member of the Association of the Bar, presenting the employer's viewpoint; Isaac Siegmeister representing the permanent impartial chairman; Elmer F. Andrews, former New York Industrial Commissioner; Milton Handler, Professor of Law at Columbia University, and others took part in the discussion.

The Committee will hold one more Conference this season, on Arbitration in National Defense. This is a large and vital problem, involving both commercial and labor disputes and, in addition, the question of Government participation in arbitrations.

REVIEW OF COURT DECISIONS

WALTER J. DERENBERG

NEW YORK COURT OF APPEALS

Retroactive Effect of Amendment to New York Arbitration Law Abolishing the Necessity of Acknowledgment of Submission. Appeal from an order affirming Special Term's order denying petitioner's application to compel

arbitration, and appeal from an order reversing an order thereafter made granting a motion to compel.[1]

Petitioner sought to compel arbitration under an unacknowledged submission signed December 30, 1931. At the time the motion to compel was originally made, the amendment to Section 1449 C. P. A. had not yet been passed. Special Term granted the motion to compel, but on motion for reargument reversed itself on the ground that the "court lacked jurisdiction to entertain the proceedings to compel arbitration because the agreement of December 30, 1931, was an agreement to submit an existing controversy to arbitration and was not acknowledged as required by law. This fact was not heretofore called to my attention." The Appellate Division affirmed, without opinion, the order denying arbitration.

Thereafter petitioner made a new motion to compel, which was granted at Special Term on the ground that in the meantime the amendment to Section 1449 had come into effect. Upon appeal, the Appellate Division reversed and denied the motion to compel arbitration under the unacknowledged agreement on the theory that the previous order denying the motion constituted a binding adjudication that the unacknowledged submission was not enforceable.

Petitioner then appealed to the Court of Appeals both from the order of the Appellate Division affirming the original order of Special Term denying the motion for arbitration, and the order of the Appellate Division reversing the subsequent order granting the motion.

Held, the order of the Appellate Division denying appellant's motion to compel arbitration should be reversed, and the appeal from the subsequent order of the Appellate Division reversing the order granting the motion to compel arbitration should be dismissed; at the time of the reargument and the denial of the motion to compel arbitration, the petitioner was entitled to an order compelling arbitration in accordance with the amended statute and the lower court erred in denying such application. Said the Court:

> Though the order granting the original motion to compel arbitration was, we assume, erroneous when made, if the bank had appealed from such order instead of moving for a reargument, an appellate court would have been bound to affirm the order of Special Term which, though erroneous when made, conformed to the statute for the purpose of giving effect to written instruments which were previously unenforcible. . . . .
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> The same reasons which lead to the conclusion that an appellate court passes upon a determination appealed from in accordance with the applicable law as it is at the time of the appeal, and not in accordance with the law as it was at the time of the original determination, dictate the conclusion that a court of first instance must, upon reargument of an earlier determination, apply the law as it is at the time of the reargument, and may not vacate its previous determination granting relief to which a suitor was not entitled where, before the reargument, the obstacle which originally barred the suitor's way is removed by retro-

[1] The decisions of the lower courts are reported in 256 App. Div. 906, 10 N. Y. S. (2d) 237, reargument denied 256 App. Div. 977, 11 N. Y. S. (2d) 254, and 258 App. Div. 632, 17 N. Y. S. (2d) 687.

active statute. Certainly the Court might properly have refused a reargument which the defeated party asked, only for the purpose of interposing the obstacle after it had been removed.

In Re Kahn's Application, 284 N. Y. 515, 32 N. E. 2d 534 (Dec. 31, 1940).

NEW YORK SUPREME COURT—APPELLATE DIVISION

Method for Appointment of Arbitrators. Appeal from an order appointing an arbitrator. A sales contract was entered into between Pulp Sales Corporation and Orange Pulp & Paper Mills, Inc., which provided: "The Rules then obtaining of the American Arbitration Association shall govern all arbitration proceedings." When a dispute arose, Pulp Sales Corporation alleged that the appointment of the arbitrator should be made in accordance with the Rules of the American Arbitration Association, while Orange Pulp & Paper Mills claimed that the appointment should be made by the Supreme Court, Queens County. Orange Pulp & Paper Mills accordingly made a motion to the Court for the appointment of an arbitrator, which was granted. *Held*, reversed.

The language of the arbitration provision quoted above must be interpreted to mean that the selection of the arbitrator is governed by the Rules of the American Arbitration Association, so that a method for the selection of the arbitrator is provided in the contract itself. The words "governing the arbitration proceeding" are broad enough to include the appointment of the arbitrator. (*In re Orange Pulp & Paper Mills, Inc., et al.*, 24 N. Y. S. (2d) 961 (2d Dept., Jan. 27, 1941).

Referees—Disqualification—Effect of Referee's Request Before Filing His Report That Parties Fix Amount of Referee's Fee. Appeal from an order denying a motion to set aside the report of a referee and all parts of the interlocutory judgment concerning the appointment of said referee, and for appointment of a new referee.[1]

In a trade-mark infringement suit, a referee was appointed by the Court to take and state the account of the profits of the defendant and the damages sustained by the plaintiff. The interlocutory judgment provided that plaintiff was to recover from defendants the expenses of the accounting reference, including "the Referee's fees, in an amount to be approved by the Court." The report of the referee recommended an award to the plaintiff of approximately $25,000, and then provided: "My fees should be added to this when fixed by the Court and judgment entered for the total sum thus determined. . . . ."

The defendant moved for an order vacating the referee's report and setting aside all portions of the interlocutory judgment concerning the appointment of said referee. The defendant based its motion to vacate the report on the claim that the referee had disqualified himself by demanding,

[1] While the case here reported did not deal with an arbitrator but with a referee, the principles established by the Appellate Division would seem to apply with equal force to arbitration cases. For this reason, the case is included herein.

prior to the filing of his report, that the defendant consent to the fixing of his fee in the sum of $7,000 instead of the amount to be approved by the Court in accordance with the interlocutory judgment. It also was alleged that the referee had notified the attorneys for the defendants of the assignment to a bank of his fee as referee before any fee was due and had directed that the sum of $1,800 be paid to the bank.

Held, order of the Supreme Court denying the motion to vacate the referee's report reversed, and motion for the appointment of a new referee granted.

> "The courts have consistently held that where a referee places the parties to a controversy in the position of having either to grant or refuse his application for fees in excess of those to which he is legally entitled, he will be removed at the instance of the party refusing his request.
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> * * * *
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> "It is not necessary that actual corruption on the part of a referee be shown. Indiscreet action on the part of a referee from which improper inferences may be drawn is sufficient to warrant setting aside his report. . . . . It is unfortunate that the parties should be subjected to the expense of a new trial in which the result may be no different, but, as was pointed out in *Greenwood* v. *Marvin* (29 Hun. 99), it is better that there be expense and delay than that there be improper precedents."

Miles Laboratories, Inc. v. *American Pharmaceutical Company, Inc., and Philip Kachurin,* App. Div., 1st Dept., N. Y. L. J., March 7, 1941, p. 1033.

NEW YORK SUPREME COURT—SPECIAL TERM

Formal Execution of Contract as Preliminary Issue of Fact. Motion to compel arbitration. Respondent claims that the parties contemplated the formal execution of a written agreement and that, therefore, the unsigned memorandum was not binding upon it. *Held,* motion denied. Where it is expressly agreed that a contract shall not be binding until signed by both parties, it cannot be enforced by either, however completely it may express their mutual agreement. Therefore, where the respondent claimed that the contract as executed was not the final agreement contemplated by the parties, an issue of fact is raised which must be disposed of before arbitration can be compelled. *Clays & Paper Research, Inc.* v. *Union Bag & Paper Corp'n,* Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., February 26, 1941, Shientag, J.

Arbitration Clauses in Principal Contract—Extension to Sub-contracts. Motion to compel arbitration. Respondent, a general contractor, entered into a contract with the Housing Authority of the City of Elizabeth, New Jersey, for the construction of a building in that city. The respondent, in turn, entered into a sub-contract with the petitioner under which the latter was to supply certain material. In the contract between respondent and the Housing Authority there was a provision for arbitration, but in the contract between petitioner and respondent there was no such provision. It is claimed,

however, that the respondent's letter to petitioner of August 25, 1939, gives petitioner a right to arbitrate. Said letter contains the following paragraph:

> "Regarding your letter delivered to us this day by your Mr. Basil, dated August 25, 1939, in which you claim an extra of two thousand four hundred seventy-eight dollars ($2,478.00), it is distinctly understood that this will be handled according to our contract with the Owners and in line with the specifications, which leave all questions of dispute to arbitration, and that you will abide by the decision of such arbitration."

Held, motion denied.

> "In making the claim that an arbitration agreement exists between the parties herein the petitioner takes the position that the petition herein does not allege an agreement to arbitrate future controversies was contained in the sub-contract between it and the respondent, but, rather, that after the controversy had arisen between the parties the petitioner and the respondent agreed to submit it to arbitration in accordance with the procedure outlined in the respondent's contract with the Housing Authority. There is a definite and sharp dispute as to what was intended by the letter of August 25, *viz,* as to whether it was only the Housing Authority with whom they were to deal or with some other person, or whether they were at liberty to invoke some other procedure in the event that the Housing Authority refused to act. Each party asserts its own claim as to what was contemplated or agreed to and as to what was meant by the letter with regard to submission to arbitration. One thing that stands out plainly is that on this point the letter is ambiguous and indefinite and that it is susceptible of more than one interpretation. In such a state of uncertainty, and with such a sharp dispute involved, a compulsory submission to arbitration will not be directed."

Michael Flynn Mfg. Co. v. *Millimet Const. Co., Inc.,* Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., March 6, 1941, p. 1019, Eder, J.

Industrial Arbitration—Inadvertent Error in an Award. Motion to confirm an award. In an arbitration concerning the issue whether a certain employee was laid off in violation of the terms of a collective bargaining agreement, the award contained the following finding:

> "H. Bros., Inc. was justified in *discharging* D. S. and did not violate Paragraph 7 of the Agreement of October 8, 1940, and I so award."

The motion was opposed on the ground that the arbitrator's award was inconsistent with the issue submitted, inasmuch as a question of lay-off, and not discharge, was involved. *Held,* motion granted. Said the court:

> It is true that the award uses the word "discharging" and that there is a difference in legal status between a discharge and lay-off. However, it is clear from the record that the word "discharging" was inadvertently used instead of "laying-off," for there was no question involved in the arbitration proceedings as to the discharge of D. S. The law looks to realities—the actual fact.

Matter of Heinsheimer Bros., Inc. (*United Wholesale & Warehouse Employees of N. Y., &c.*), Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., February 19, 1941, p. 770, Eder, J.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Collection or Arbitration of Claims Does Not Constitute the "Practice of Law." Appeal from a judgment restraining appellant from engaging in specified activities held by the court to constitute the practice of law. This suit was brought by the Committee on Suppression of Unauthorized Practice of Law of the Bar Association of the District of Columbia against the American Automobile Association, Inc. Defendant conducted the so-called District of Columbia Motor Club with a membership of approximately 29,000 in the District and surrounding areas. For a fee of $12 a year, the Club offered, among others, the following services to its members: (a) Its good offices amicably to adjust without court action claims for property damage to automobiles for or against a member where the amount in controversy did not exceed $100 (now $50); (b) Good offices to induce the submission of such claims to arbitration. For these purposes a Department of Claims and Adjustment was maintained. In cases where said Department failed to reach an amicable settlement the member would be advised to consult his attorney or to proceed in the Small Claims Court. The District Court found that defendant's attempts to adjust, without court action, claims for propery damage to automobiles, or to settle such claims by arbitration, constituted a practice of law, and issued an injunction against the operation of the Department of Claims and Adjustment. *Held*, modified.

Said the court:

> We do not think appellant is entirely precluded from serving its members by lay employees with respect to damage claims. We are referred to no case, and we have not found one, in which it is held that the collection or arbitration of claims alone amounts to the practice of law. Decisions against collection agencies invariably rest on evidence that the agency gave legal advice to the creditor, threatened legal proceedings, or employed attorneys and prosecuted the claim in court. . . . . We are not, therefore, prepared to hold that a creditor may not attempt through an agent a peaceful collection of a liquidated claim, or that a creditor may not agree through an agent to an arbitration of his claim.

American Automobile Ass'n, Inc. v. *Merrick, et al.*, 117 F. 2d 23 (Dec. 30, 1940).

SUPREME COURT OF MINNESOTA

Defective Statutory Arbitration Enforceable in Minnesota by Common Law Action on the Award.—Future Dispute Provisions in Contracts Held No Longer Contrary to Public Policy of the State. Appeal from an order sustaining defendant's general demurrer to a complaint for recovery by action on an award. In December, 1938, defendant contracted with plaintiff to

grade an athletic field. The contract required that "all questions" subject to arbitration thereunder "shall be submitted to arbitration at the choice of either party." Another provision stipulated that "such decision [of the arbitrators] shall be a condition precedent to any right of legal action." The contract did not name the arbitrators put provided for their selection in the event that arbitration was demanded by either party.

Work under the contract progressed until August 1939, when, disputes having arisen, plaintiff demanded arbitration of five issues. An arbitration resulted, three arbitrators having been selected pursuant to the contract. Defendant objected to any arbitration on the grounds that there was "no foundation laid for arbitration" and that four of the stated issues were "not matters proper for arbitration" under the specifications.

Notwithstanding such objection, the arbitration went forward with an award to plaintiff for the recovery of which this action was brought. All matters designated in plaintiff's demand "were fully tried and submitted to the arbitrators."

The lower court held that there had been a valid revocation of the agreement to arbitrate, and therefore the award subsequently rendered was unenforceable.

Held, reversed. Said the court:

> ". . . . We disagree with the thesis that a completed arbitration, not complying with the applicable statute, cannot be sustained under the common law, where, as here, the statute so plainly preserves the common-law right of arbitration.[1] Our deferential submission is that even though the initial agreement of the parties contemplated a statutory arbitration, they have not thereby lost their right later to proceed under the common law.
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> "So, even though first intention was to stick to the statute, if later they have set up a common-law arbitration, the parties themselves have annulled their first agreement for a statutory proceeding. Their own effective action has substituted one at common law. We just cannot discover why we have any right to thwart such a legitimate purpose so lawfully accomplished. Insofar as *Holdridge* v. *Stowell* (39 Minn. 360, 40 N. W. 259) runs counter to the foregoing, it is overruled."

The Court then proceeds to discuss the argument that the contract, insofar as it provided for arbitration, was void as against public policy, and rejects this contention in the following significant language:

> "The historical and only basis for the opinion that executory agreements to arbitrate all issues to arise under a contract are void, as against public policy, is open to serious question. There is eminent authority (Lord Campbell, in *Scott* v. *Avery*, 25 L. J. [N. S. Exch.] 308), that the rule was the product of judicial jealousy rather than judicial reasoning. He said that it arose in the time when 'the emoluments of the Judges depended mainly, or almost entirely, upon fees.'

[1] Section 9513 of the Minnesota Statute provides: "Nothing herein shall preclude the arbitration of controversies according to the common law."

In those days they had no fixed salary and so 'there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble . . . . for the division of the spoil.' In consequence, 'they had great jealousy of arbitrations. . . . . Therefore they said that the Courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so.'

"To that doctrine, its questionable origin aside, there are two destructive objections:

"First, there appears never to have been any factual basis for holding that an agreement to arbitrate 'ousted' jurisdiction. It has no effect upon the jurisdiction of any court. Arbitration simply removes a controversy from the arena of litigation. It is no more an ouster of judicial jurisdiction than is compromise and settlement or that peculiar offspring of legal ingenuity known as the covenant not to sue. Each disposes of issues without litigation. One no more than the other ousts the courts of jurisdiction. The right to a jury trial, even in a criminal case, may be waived. So, also, may the right to litigate be waived. Such waiver may be the result of contract or unilateral action.

" 'The decision by arbitration is the decision of a tribunal of the parties' own choice and erection.' *Daniels* v. *Willis*, 7 Minn. 374, 7 Gil. 295, 303. The tribunal is one that they have a legal right to erect. That being so, what self-justification can judges assert for nullifying such rightful choice? In the field of industry, a chorus of deserved derision would silence declaration that a collective bargaining agreement for arbitration of future issues was violative of public policy.

"Second, if there ever was public policy against agreements to arbitrate, it has disappeared. Now the policy of this state, as declared by the legislature, Mason's Minn. St. 1927, § 9513, *et seq.* and applied by this court, *Daniels* v. *Willis*, *supra*, and *Larson* v. *Nygaard*, 148 Minn. 104, 108, 180 N. W. 1002, favors arbitration.

"Public policy, where the legislature has spoken, is what it has declared that policy to be. So far as the question of policy is concerned our statute settles the matter. It not only establishes the process of statutory, but confirms that of common-law, arbitration.

"Here again our conclusion opposes that of many earlier decisions of this court. Insofar as they have ruled that a general agreement to arbitrate all differences to arise under a contract is contrary to public policy and therefore void, they are overruled. They include: *Gasser* v. *Sun Fire Office*, 42 Minn. 315, 44 N. W. 252; *Whitney* v. *National Masonic Acc. Ass'n*, 52 Minn. 378, 54 N. W. 184; *Aaberg* v. *Minnesota Commercial Men's Ass'n*, 152 Minn. 478, 189 N. W. 434; *Abramowitz* v. *Continental Ins. Co.*, 170 Minn. 215, 212 N. W. 449; *Glidden Co.* v. *Retail Hardware Mut. Fire Ins. Co.*, 181 Minn. 518, 233 N. W. 310, 77 A. L. R. 616. They are disapproved notwithstanding their accord with a prevailing view of decision law elsewhere. Restatement, Contracts, § 551.

"For this departure from a doctrine of long standing, we make no apology. To us, the reasons assigned are so compelling as to allow no other course. It is enough that the legislature has declared for arbitration, both statutory and common law. That fixes the policy of this

state for, rather than against, arbitration. The apology should be rather for the regrettable fact that our decision law did not promptly reflect the legislative declaration." [2]

Park Const. Co. v. *Independent School Dist. No. 32, Carver County,* 296 N. W. 475 (Jan. 17, 1941. Rehearing denied Feb. 28, 1941).[3]

NOTES

Important Amendment to the New York Arbitration Law Passed. Section 1448 of the Civil Practice Act, dealing with the validity and enforcement of arbitration contracts or submissions, has now been amended as follows:

> "Such submission or contract may include questions arising out of valuations, appraisals, or other controversies which may be collateral, incidental, precedent or subsequent to any issue between the parties."

This amendment which was introduced in the Assembly by Assemblyman Parsons on February 17, 1941, and in the Senate on the same day, has now been signed by the Governor. The amendment fills the gap which was left in the New York Arbitration Law by the decision of the Court of Appeals in matter of *Fletcher,* 237 N. Y. 440, 1924, in which the Court refused to appoint an "arbitrator" for the purpose of evaluating stock. The Court of Appeals held at that time that questions of appraisals and evaluations did not involve a "controversy" and that the arbitration statute applied only in cases concerning "questions of ultimate liability." By thus eliminating all kinds of appraisals and evaluations from the benefits of the arbitration statute and its enforcement provisions, much needless litigation has constantly arisen concerning appraisals of losses in insurance cases, determination of fair rental value between landlord and tenant, and like issues.

The recently passed amendment now brings all these issues within the scope of the arbitration law and makes it possible for the American Arbitration Association, as well as trade associations, to appoint appraisers and conduct hearings in such cases wherever the parties have designated such Association as the appointing agency.

In cases where the parties fail to indicate in their agreement the rules under which the appraisal shall be conducted, and who is to appoint the appraiser, the Supreme Court is now authorized, under this amendment, to make the appointment upon application by either party.

Boards of Inquiry in Labor Disputes Authorized by Statute. The New York Labor Law was recently amended by a statute authorizing the appointment of Boards of Inquiry in labor disputes. The statute became effective on March 24, 1941, and is now incorporated in Chapter 133 of the Laws of New

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[2] Justice Peterson dissented in an elaborate dissenting opinion, in which Chief Justice Gallagher concurred.

[3] The legal effect of this important decision and its place in the future progress of commercial and industrial arbitration is fully discussed in an article by Julius Henry Cohen in this issue, at page 209.

York, Article 22, Sections 800 to 805. Under this amendment, Boards of Inquiry may be appointed where any strike, lockout or other labor dispute exists or is apprehended, for the purpose of inquiring into the causes and circumstances of the dispute. The Board shall hold hearings either in public or in private at its discretion. No reference to such Board shall be made until the State Mediation Board has certified that its efforts to effect the voluntary settlement have been unsuccessful.

The Board shall make a final report which may be made public and may also make interim reports.